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Table of Contents

Articles

The Interpretation of the Homicide Act, 1957. *By D. W. Elliott, LL.B.* ... 5

Should the Police Fine Offenders on the Spot? *By Captain Athelstan Popkess, C.B.E.* ... 14

Receiving Stolen Property. *By R. H. A. Eames* ... 20

Mr. Sutterthwick's Court. *By A. E. Jones*:
  Driving while Disqualified ... 34
  Two "Suspects" ... 461
  Publishing Obscene Articles ... 621

Committal on Inquisition. *By J. D. J. Havard, M.A., LL.B., M.B.* ... 44

Fitness to Plead. *By Michael Dean, LL.B.* ... 79

The Taking of Statements from Victims and Witnesses of Sexual Offences. *By Miss D. O. G. Peto* ... 86

Towards the Deodand. *By J. W. Cecil Turner* ... 89, 168

The Protection of Documents Against Forgery. *By Wilson R. Harrison, M.Sc., Ph.D.* ... 98

The Drinking Driver and the Law. *By A Special Correspondent* 152

Prosecuting Officer. *By Christopher Williams*:
  Police notebooks ... 160
  Matters arising ... 243
  Conclusion ... 391

Aiding and Abetting Offences under the Licensing Act, 1953. *By F. Vernon Renshaw, LL.B.* ... 180

Industrial Disputes and the Criminal Law. *R. H. A. Eames* 232

A Scottish Newsletter. *By a Scots Advocate* ... 250

A Concept of Crime. *By P. J. Fitzgerald* ... 257

Police Questioning, Custody and Caution. *By Ian Brownlie, M.A.* ... 298

Questioning by the Police:
  Some Practical Considerations. *By Glanville Williams, LL.D.* 325
  Some Further Points—1. *By J. C. Smith, M.A., LL.B.* ... 347
  Some Further Points—2. *By Christopher Williams* ... 352

The Functions of the Judge and Jury with regard to Confessions. *By Rupert Cross, D.C.L.* ... 385

LABORATORY INVESTIGATIONS IN FIREARMS CASES. *By Detective Chief Inspector George Price, B.E.M.*:
I. Classification and Identification of Firearms and Ammunition 404
II. The Microscopical Examination and Comparison of Bullets and Cartridge Cases 478
III. The Determination of the Range of a Shot 543
IV. The Examination of the Firearm and Ammunition ... 611

CAN THE PROSECUTION ALLEGE THAT THE ACCUSED IS INSANE? *By H. A. Samuels, B.A.* 453

AN AUSTRALIAN LETTER. *By Professor Norval Morris* 468

STREET OFFENCES ACT, 1959. *By J. C. Wood, LL.M.* 521

INTENT TO DEFRAUD RECONSIDERED. *By G. H. L. Fridman, M.A., B.C.L., L.C.M.* 530

THE NEW ROAD TRAFFIC LEGISLATION. *By K. C. Clarke* 591

STATUTORY POWERS OF SEARCH AND ARREST ON THE GROUND OF UNLAWFUL POSSESSION. *By Glanville Williams, LL.D.* ... 599

SOCIAL AND FAMILY ASPECTS. *By H. A. Prins* 657

RACIAL DISTURBANCES IN NOTTINGHAM. *By Captain Athelstan Popkess, C.B.E.* 673

THE SENTENCING POLICY OF THE COURTS. *By T. E. James* ... 678

TREATMENT IN PRISON. *By Gordon Hawkins* 689

BLOOD AND FORENSIC SCIENCE. *By Dr. G. B. Manning* 700

THE LAW VERSUS PROSTITUTION. *By A. E. Jones* 704

THE NEED FOR A RE-DEFINITION OF MURDER. *By Rupert Cross, D.C.L.* 728

SECOND UNITED NATIONS CONGRESS ON THE PREVENTION OF CRIME AND THE TREATMENT OF THE OFFENDER. *By Jean Graham Hall, LL.M.* 742

ASSESSORS IN CRIMINAL TRIALS IN WEST AFRICA. *By Berthan Macaulay, M.A., LL.B.*—Part I 748
Part II 825

PRELIMINARY INVESTIGATIONS OF CRIMINAL OFFENCES 793

Letters to the Editor

Prosecuting officer: compellability of Defendant's Wife 224
Scottish newsletter: "Frivolous appeals" 446
Traffic Procedure in Western Australia 505
The Drinking Driver and the Law 507
Mr. Sutterthwick's Court—two "suspects" 582
Punishment by Imprisonment 785
The Law Versus Prostitution 855

Book Reviews

BALE, ISLWYN, Through Seven Reigns 651
BIRKS, MICHAEL, Gentlemen of the Law 786
BRITISH JOURNAL OF PSYCHIATRIC SOCIAL WORK, Vol. IV 227
BROWNE, D. G., Sir Travers Humphreys 514
BRYAN, PETER, Show Me a Lawyer 380
CECIL, HENRY, Alibi for a Judge 447
CLARK, SIR G., The Campden Wonder 71
COOPER, W. E, and BAMFORD, B. R., Handbook on the Criminal Procedure Act, etc. 649
CROSS and JONES, An Introduction to Criminal Law 509
DAVIDSON and ASHMAN, The Jury is Still Out 515
DEALE, K. E. L., Memorable Irish Trials 447
DEWITT, CLINTON, Privileged Communications Between Physician and Patient 289
HARRISON, B. FRASER, Advocacy at Petty Sessions. 2nd edition ... 288
HOWARD, D. L., The English Prisons 720
JACKSON, R., The Chief 69
KEETON, G. W., Trial for Treason 291
KITCHIN, Road Transport Law 583
KLARE, HUGH, The Anatomy of Prison 511
MANNHEIM, HERMANN, Courts for Adolescents 147
MANT, A. KEITH, Forensic Medicine: Observation and Interpretation 287
MILTON, FRANK, In Some Authority 515
PALMER, H. A., and PALMER, HENRY, Harris's Criminal Law. 20th edition 721
POLSON, C. J., and TATTERSALL, R. N., Clinical Toxicology ... 649
VOLD, GEORGE B., Theoretical Criminology 147
WHITESIDE and WILSON, Stone's Justices' Manual 513
WILSON, J. G., Not Proven 515
WILSON, JOHN GRAY, The Trial of Peter Manuel 227
YAP, P. M., Suicide in Hong Kong 287

Reader's Digest

Contempt 447
Costs 72
Courts 292
Evidence 228, 516
Forensic medicine 228, 448
Homicide 292, 652, 724, 788, 856
Intent 292
Magistrates 380, 448
Magistrates' courts 292
Misprision of felonies 380

Murder 72
Obscenity 72
Penology 228, 380, 856
Police 228, 788
Practice and procedure 228, 380, 516, 652
Procedure 788
Prostitution 72
Recognisances 72
Road traffic 228, 292, 380, 448, 788
Tape recorders 516

Table of Statutes

Judicially considered or digested

1448 Sunday Fairs Act (27 Hen. 6, c. 5) 206
1627 Sunday Observance Act (3 Car. 1, c. 2) 206
1677 Sunday Observance Act (29 Car. 2, c. 7) 206
1824 Vagrancy Act (5 Geo. 4, c. 83)—
s. 4 .... 580, 582
ss. 4, 5 .... 524, 525
1838 Vagrancy Act (1 & 2 Vict. c. 38), s. 2 580
1839 Metropolitan Police Act (2 & 3 Vict. c. 47)—
s. 24 .... 600, 601
s. 54 (13) 489
s. 66 .... 598, 602, 606
s. 69 598
1840 Canals (Offences) Act (3 & 4 Vict. c. 50), s. 11 604
1858 Stipendiary Magistrates Act (21 & 22 Vict. c. 73), s. 7 601
1861 Malicious Damage Act (24 & 25 Vict. c. 97)—
s. 36 195
s. 52 (1) 562
1875 Public Stores Act (38 & 39 Vict. c. 25), s. 6 604
1883 Explosive Substances Act (46 & 47 Vict. c. 3)—
s. 4 208
(1) 57, 554, 559
1887 Merchandise Marks Act (50 & 51 Vict. c. 28), s. 2 438
1889 Public Bodies Corrupt Practices Act (52 & 53 Vict. c. 69), s. 1 (2) 185, 773
1892 Burgh Police (Scotland) Act (55 & 56 Vict. c. 55), s. 409 .. 269
1898 Criminal Evidence Act (61 & 62 Vict. c. 36) 644
s. 1 (*f*) 420, 556
1903 Licensing (Scotland) Act (3 Edw. 7, c. 25)—
s. 53 268
s. 84 369
Motor Car Act (3 Edw. 7, c. 36), s. 9 (1) 199
1906 Prevention of Corruption Act (6 Edw. 7, c. 34) 773
1907 Criminal Appeal Act (7 Edw. 7, c. 23)—
s. 4 (1) 57, 189, 211, 360, 490, 559
s. 21 192
1913 Forgery Act (3 & 4 Geo. 5, c. 27)—
s. 4 423
(1) 129, 191
(2) 534
s. 6 423
Mental Deficiency and Lunacy (Scotland) Act (3 & 4 Geo. 5, c. 38), ss. 46 (1) (*a*), 56 . 201
1915 Indictments Act (5 & 6 Geo. 5, c. 90)—
s. 3 (1) 559
Sched. I, r. 4 774
London County Council General Powers Act (5 & 6 Geo. 5, c. 103), s. 16 837
1916 Larceny Act (6 & 7 Geo. 5, c. 50)—
s. 20 (1) (ii) 759
s. 26 (1) 426, 554
s. 27 (2) 554, 569
s. 43 (1) (*b*) 524
(3) 360
1924 London Traffic Act (14 & 15 Geo. 5, c. 34) 591
1925 Criminal Justice Act (15 & 16 Geo. 5, c. 86)—
s. 13 (3) 125
s. 32 209
1926 Criminal Appeal (Scotland) Act (16 & 17 Geo. 5, c. 15)—
s. 2 (1) 273
s. 6 (6) 567
Merchandise Marks Act (16 & 17 Geo. 6, c. 53), s. 6 .. 438
1930 Road Traffic Act (20 & 21 Geo. 5, c. 43)—
s. 7 563
(4) 196, 197
s. 9 (1) (2) 591
s. 11 429
s. 12 (1) 271
s. 15 (1) 273
s. 21 564
s. 22 527
(*c*) 430
s. 28 .. 198, 200, 578, 709, 711
s. 35 .... 563, 709, 711
(1) 64
s. 49 188
1933 Children and Young Persons Act (23 & 24 Geo. 5, c. 12), s. 15, Sched. I 644
Administration of Justice (Miscellaneous Provisions) Act (23 & 24 Geo. 5, c. 36), s. 2 (1) (2) (3) 208
Road and Rail Traffic Act (23 & 24 Geo. 5, c. 53), s. 9 . 774
1934 Betting and Lotteries Act (24 & 25 Geo. 5, c. 58) 58
ss. 21, 22 (1) (*f*) 59
1935 London County Council (General Powers) Act (25 & 26 Geo. 5, c. 33) s. 55 . 837
1937 Factories Act (1 Edw. 8 & 1 Geo. 6, c. 67), s. 133 128
1939 London Government Act (2 & 3 Geo. 6, c. 40), s. 181 (3) 62
1944 Education Act (7 & 8 Geo. 6, c. 31), s. 36 364
1945 Police (Overseas Service) Act (9 & 10 Geo. 6, c. 17) .. 716
1947 Exchange Control Act (10 & 11 Geo. 6, c. 14) 851
1948 Companies Act (11 & 12 Geo. 6, c. 38), ss. 159, 167, 205, 333, 448 (1), 455 187
Criminal Justice Act (11 & 12 Geo. 6, c. 58)—
s. 4 375
s. 6 (3) 272
s. 8 (5) 202
s. 21 (5) 370
s. 22 .... 202, 204, 373
s. 23 .... 62, 202

1949 Vehicles (Excise) Act (12, 13 & 14 Geo. 6, c. 89) 591
s. 15 (1) 562
Air Corporations Act (12, 13 & 14 Geo. 6, c. 91), s. 24 (3) (*c*) 629
Criminal Justice (Scotland) Act (12, 13 & 14 Geo. 6, c. 94), s. 19 577
1950 Shops Act (14 Geo. 6, c. 28), ss. 2 (1) (*b*), 14 (2) 205
Diseases of Animals Act (14 Geo. 6, c. 36), s. 84 846
1951 Dangerous Drugs Act (14 & 15 Geo. 6, c. 48) 634
ss. 11 (1), 15 217
1952 Customs and Excise Act (15 & 16 Geo. 6 & 1 Eliz. 2, c. 44), ss. 257, 304 122
Magistrates' Courts Act (15 & 16 Geo. 6 & 1 Eliz. 2, c. 55)—
s. 7 208
ss. 18 (5), 24 207
s. 29 204
s. 97 681
s. 104 561
Sched. 1 207
Visiting Forces Act (15 & 16 Geo. 6 & 1 Eliz. 2, c. 67), s. 3 644
Prevention of Crime Act (15 & 16 Geo. 6 & 1 Eliz. 2, c. 14), s. 1 (1) 133
1953 Licensing Act (1 & 2 Eliz. 2, c. 46), Sched. 2 496
Merchandise Marks Act (1 & 2 Eliz. 2, c. 48) 438
1955 Food and Drugs Act (4 Eliz. 2, c. 16), s. 37 (1) 442
1956 Food and Drugs (Scotland) Act (4 & 5 Eliz. 2, c. 30), s. 39 369
Small Lotteries and Gaming Act (4 & 5 Eliz. 2, c. 45), s. 4 838
Road Traffic Act (4 & 5 Eliz. 2, c. 67)—
s. 8 432
(1) 273
s. 16 (3) 584
s. 19 (1) 719
Sexual Offences Act (4 & 5 Eliz. 2, c. 69) 643, 644
s. 6 (1) (3) 204
1957 Homicide Act (5 & 6 Eliz. 2, c. 11)—
s. 2 .... 517, 763
s. 3 772
s. 5 (1) (*a*) 201, 213
Occupiers' Liability Act (5 & 6 Eliz. 2, c. 31) 59
Road Transport Lighting Act (5 & 6 Eliz. 2, c. 51) 591
s. 1 (1) 497
1958 Litter Act (6 & 7 Eliz. 2, c. 34), s. 1 561
1959 Licensing (Scotland) Act (7 & 8 Eliz. 2, c. 51) 269
Street Offences Act (7 & 8 Eliz. 2, c. 57)—
s. 1 (1) 709
s. 2 (1) 521
Mental Health Act (7 & 8 Eliz. 2, c. 72) 852
1960 Road Traffic Act (8 & 9 Eliz. 2, c. 16) 589, 591
ss. 5–8 594
ss. 13, 15, 16 596
ss. 17–19, 22 597
s. 26 .... 593, 595, 596
s. 29 595
s. 64 597
s. 81 .... 595, 596
s. 85 .... 593, 718
s. 88 594
ss. 135, 141, 143 594
s. 267 (1) 592
Sched. 18 .... 444, 592
Sched. 20 592
Indecency with Children Act (8 & 9 Eliz. 2, c. 33), s. 1 (1) 643
Radioactive Substances Act (8 & 9 Eliz. 2, c. 34)—
s. 1 (1) 642
ss. 2–9, 12, 13 643
Civil Aviation (Licensing) Act (8 & 9 Eliz. 2, c. 38) 644
Abandonment of Animals Act (8 & 9 Eliz. 2, c. 43), s. 1 (1) 642
Road Traffic Amendment Act (8 & 9 Eliz. 2, c. 51) . 591, 717
Films Act (8 & 9 Eliz. 2, c. 57) 783
Betting and Gaming Act (8 & 9 Eliz. 2, c. 60) 716, 847
Road Traffic and Roads Improvement Act (8 & 9 Eliz. 2, c. 63) 589, 592
ss. 1, 7, 9–11 717
s. 11 (7) (12) 595
ss. 13, 15 717

Table of Cases

Aberg [1948] 2 K.B. 173; 64 T.L.R. 215; 112 J.P. 206; 92 S.J. 181; [1948] 1 All E.R. 601; 32 Cr.App.R. 144; 46 L.G.R. 242, C.C.A. 117
—— *v.* D.P.P. [1937] A.C. 576 761
Advocate (H.M.) *v.* McRorie, *The Times*, October 4, 1960 839
Appleby, C.C.A. 712
Astle, C.C.A. 640
Astley, C.C.A. 137
Att.-Gen. for State of South Australia *v.* Brown [1960] A.C. 432; [1960] 2 W.L.R. 588; [1960] 1 All E.R. 734; 44 Cr.App.R. 100 425
Auten *v.* Rayner (No. 2) [1960] 1 Q.B. 669; [1960] 2 W.L.R. 562; [1960] 1 All E.R. 692 362

Baker *v.* Earl, *The Times*, February 6, 1960, D.C. 363
Barsted *v.* Jones (1960) 124 J.P. 400, D.C. 495
Bass [1953] 1 Q.B. 680; [1953] 2 W.L.R. 825; 117 J.P. 246; 97 S.J. 282; [1953] 1 All E.R. 1064; 37 Cr.App.R. 51, C.C.A. 385
Bass *v.* Boynton, 124 J.P.J. 357, D.C. 497
Beal, C.C.A. 641
Bell, C.C.A. 65
Benn, C.C.A. 277
Bennett, *Ex p.* Radburn [1960] 1 W.L.R. 102; 104 S.J. 128; [1960] 1 All E.R. 335, D.C. 206
Bentley, *The Times*, July 19, 1960, C.C.A. 777
Betta Cars *v.* Ilford Corporation (1959) 124 J.P. 19; 103 S.J. 834, D.C. 206
Bour and Others *v.* Heatly, 1960 S.L.T. 811 838
Bowles, C.C.A. 572
Boylan, Plymouth Q.S. 193
Bracey [1959] Crim.L.R. 231 566
Brodrick, Q.S. 426
Brown (1960) 124 J.P. 391; 124 J.P.J. 356; 44 Cr.App.R. 181, C.C.A. 556
—— *v.* Henry Dougal & Sons, 1959 S.C.(J.) 90; 1960 S.L.T. (Ct. of Sess.) 19 774
Bryan *v.* Robinson [1960] 1 W.L.R. 506; 124 J.P. 310; 104 S.J. 389; [1960] 2 All E.R. 173; 76 L.Q.R. 350, D.C. 489
Buck and Buck, Leeds Assizes 760
Buckland, C.C.A. 65
Burge, C.C.A. 138
Burnett, C.C.A. 275
Burnham, Bucks, Justices, *ex p.* Ansorge [1959] 1 W.L.R. 1041; 123 J.P. 539; 103 S.J. 920; [1959] 3 All E.R. 505, D.C. 199
Burt [1960] 1 Q.B. 625; [1960] 2 W.L.R. 398; 124 J.P. 201; 104 S.J. 148; [1960] 1 All E.R. 424, D.C. 187
Byrne [1960] 3 W.L.R. 440; 124 J.P.J. 498; 104 S.J. 645; 230 L.T. 68; [1960] 3 All E.R. 1, C.C.A. 763

Cairns, C.C.A. 215
Carpenter, C.C.A. 633
Carter, C.C.A. 636
Cartwright *v.* William Briggs & Sons, 1959 S.L.T. (Sh.Ct.) 68 128
Casino de Paris, Ltd. *v.* Newberry, *The Times*, October 8, 1960, D.C. 836
Chambers and Wilson, Sheffield Winter Assize 437
Chapman & Pidgley [1960] 1 W.L.R. 147; 124 J.P. 219; 104 S.J. 170; [1960] 1 All E.R. 452; 44 Cr.App.R. 115, C.C.A. 272
Clarke, C.C.A. 214
Clynes (1960) 44 Cr.App.R. 158, C.C.A. 557
Cokar [1960] 2 W.L.R. 836; 124 J.P. 313; 104 S.J. 389; [1960] 2 All E.R. 175; 44 Cr.App.R. 165, C.C.A. 420
Collier, Hertford Assizes [1958] Crim.L.R. 544 204
Collins (1960) 44 Cr.App.R. 170, C.C.A. 490
Cooper [1959] Crim.L.R. 301, C.C.A. 371
Court, *The Times*, June 28, 1960, C.C.A. 631
Craven, C.C.A. 568
Crimmins [1959] V.R. 270 117
Cuff, Lord Parker C.J. 571

D. (An Infant) *v.* Parsons [1960] 1 W.L.R. 797; 229 L.T. 356; 124 J.P. 375; 104 S.J. 605; [1960] 2 All E.R. 493, D.C. 711
Davis, C.C.A. 638

Dawson and Wenlock [1960] 1 W.L.R. 163; 124 J.P. 237; 104 S.J. 191; [1960] 1 All E.R. 558; 44 Cr.App.R. 87; 23 M.L.R. 432, C.C.A. 358
D.P.P. *v.* Milbanke Tours [1960] 1 W.L.R. 630; 124 J.P. 353; 104 S.J. 526 [1960] 2 All E.R. 467, D.C. 629
—— *v.* Smith [1960] 3 W.L.R. 546; 104 S.J. 683; [1960] 3 All E.R. 161, H.L. 765
Docherty, *Ex p.*, *The Times*, October 18, 1960, D.C. 835
Donovan, C.C.A. 441
Dowell, C.C.A. 436

Edmonton Justices, *ex p.* Brooks [1960] 1 W.L.R. 697; 124 J.P. 409; 104 S.J. 547; [1960] 2 All E.R. 475, D.C. 564
Elliott *v.* Grey [1959] 3 W.L.R. 956; 124 J.P. 58: 103 S.J. 921; [1959] 3 All E.R. 733; *sub nom.* Elliott *v.* Gray, 57 L.G.R. 357, D.C. 63

Farrell *v.* Rennicks, 1959 S.L.T. (Sh.Ct.) 71 133
Faulkner, C.C.A. 214
Folkard, C.C.A. 372
Forster *v.* Robinson, High Ct. of Justiciary 268
Frendo, Lord Parker C.J. 571

Gall, C.C.A. 640
Garland, Pontefract Borough Quarter Sessions 129
Gatenby and Others, Leeds Assizes 195
Gibbs, Cr.App.R. 77, C.C.A. 197
Gill, *The Times*, April 13, 1960, C.C.A. 440
Ginger, C.C.A. 140
Glinski *v.* McIver, *The Times*, February 6, 1960, C.A. 428
Golder, *The Times*, October 18, 1960 832
Grant, Liverpool Assizes 424
Grierson and Powdrill, C.C.A. 773

Halligan, *The Times*, April 5, 1960, C.C.A. 422
Hammond (1941) 28 Cr.App.R. 84 385
Hancox, C.C.A. 714
Hart, C.C.A. 277
Hasemore, C.C.A. 138
Hastings, *Ex p.*, *The Times*, November 11, 1959, C.A. 61
Hayes, C.C.A. 714
Hesketh, C.C.A. 202
Hibbert, C.C.A. 441
H.M. Advocate. See Advocate.
Hogan *v.* Tompkins, [1960] 3 W.L.R. 426; 124 J.P. 457; S.J. 645; [1960] 3 All E.R. 149, C.C.A. 775
Hopes & Lavery *v.* H.M. Advocate [1960] S.L.T. 264, C.C.A. 566
Hosking (noted in [1955] Crim.L.R. 291) 117
Hughes *v.* Hall [1960] 1 W.L.R. 733; 229 L.T. 355; 124 J.P. 411; 104 S.J. 566; [1960] 2 All E.R. 504; 76 L.Q.R. 488, D.C. 710

Ilford Corporation *v.* Harrison Gibson, Beacontree Magistrates' Court 205

Jackson, C.C.A. 373
James [1960] 1 W.L.R. 812; 124 J.P. 442; 104 S.J. 607; [1960] 2 All E.R. 863, Lord Parker C.J. 573
Johnson, C.C.A. 430
Johnson, *The Times*, October 3, 1960, C.C.A. 846
Johnston *v.* Heatley, High Ct. of Justiciary 269
Jollye *v.* Daley [1960] 2 W.L.R. 1027; 124 J.P. 333; 104 S.J. 467; [1960] 2 All E.R. 369, D.C. 565

Keeley [1960] 1 W.L.R. 749; 124 J.P. 325; 164 S.J. 586; [1960] 2 All E.R. 415; 44 Cr.App.R. 176, C.C.A. 498
Kennedy, C.C.A. 439
Kensington Borough Council *v.* Walters [1959] 3 W.L.R. 945; 124 J.P. 54; 103 S.J. 921; [1959] 3 All E.R. 652; 57 L.G.R. 361, D.C. 62, 168

Langstaff and Lawrence *v.* Hedley, Q.S. 438
Lansbury, C.C.A. 713
Lee, 66 D.L.R. 492 206
Leroy, C.C.A. 372
Lewis, C.C.A. 435
—— (1909) 2 Cr.App.R. 180 435
Ling, *The Times*, April 5, 1960, C.C.A. 434

Liverpool Justices, *ex p.* Roberts [1960] 1 W.L.R. 585; 124 J.P. 336; 104 S.J. 450; [1960] 2 All E.R. 384, D.C. 555
Lomas *v.* Peek 63 T.L.R. 593; 112 J.P. 13; [1947] 33 All E.R. 574; 46 L.G.R. 15, D.C. 209
L.C.C. *v.* Freeman, Hardy & Willis (1913) 77 J.P. 245 206
Lorch, C.C.A. 140

McAdam *v.* H.M. Advocate, 1960 S.L.T. 47, High Ct. of Justiciary 364
McKenna and Others [1960] 1 Q.B. 411; [1960] 2 W.L.R. 366; 124 J.P. 179; 104 S.J. 109; [1960] 1 All E.R. 326; 44 Cr.App.R. 63, C.C.A. 210
McVitie [1960] 3 W.L.R. 99; 124 J.P. 404; 104 S.J. 510; [1960] 2 All E.R. 498; 44 Cr.App.R. 201, C.C.A. 559
Mack *v.* H.M. Advocate, 1959 S.L.T. (Reports) 288 201
McKenzie *v.* H.M. Advocate, 1959 S.C.(J.) 32, High Court of Justiciary 273
Macmillan *v.* Lakie, 1960 S.L.T.(Sh.Ct.) 2 369
MacPherson, *The Times*, January 11, 1960, C.C.A. 215
Martin, C.C.A. 713
Martin *v.* H.M. Advocate, 41 1960 S.L.T. (Ct. of Sess.) 213 635
Mason, Lord Parker C.J. 572
Mellor, *The Times*, October 10, 1960, C.C.A. 845
Mitchell, Hilbery J. 572
Mitchell and Jones, C.C.A. 211
Mordanam [1960] 1 W.L.R. 7; 124 J.P. 95; 103 S.J. 1029; [1959] 3 All E.R. 875; 44 Cr.App.R. 39, C.C.A. 204
Moye, C.C.A. 266
Mwenya, *Re* [1959] 3 W.L.R. 767; 103 S.J. 898; [1959] 3 All E.R. 525, C.A.; reversing [1959] 3 W.L.R. 509; 103 S.J. 583, D.C. 59

Nicholls [1960] 1 W.L.R. 658; 124 J.P. 343; 104 S.J. 547; [1960] 2 All E.R. 449; 44 Cr.App.R. 188, C.C.A. 569
Norrington, Essex Assizes 432

O'Connor, *The Times*, February 23, 1960, C.C.A. 275

Parkhurst Prison, *ex p.* Philpot [1960] 1 W.L.R. 115; 124 J.P. 124; 104 S.J. 168; [1960] 1 All E.R. 165; 44 Cr.App.R. 49, D.C. 369
Patterson *v.* Helling, Q.B.D. 562
—— *v.* Nixon, 1960 S.L.T. (Ct. of Sess.) 220 634
Peach, 1959, 103 S.J. 814, C.C.A. 134
Philcox *v.* Carberry, Q.B.D. 563
Phillips and Bridgewater, C.C.A. 139
Pickard, Leeds Assizes 125
Podola [1960] 1 Q.B. 325; [1959] 3 W.L.R. 718; 103 S.J. 850; [1959] 3 All E.R. 418; 43 Cr.App.R. 220, C.C.A. 79
Poole *v.* R. [1960] 3 W.L.R. 770; 104 S.J. 868; [1960] 3 All E.R. 398 841
Porter, C.C.A. 139
——, Winchester Q.S. 202
Prater [1960] 2 W.L.R. 343; 124 J.P. 176; 104 S.J. 109; [1960] 1 All E.R. 298; 44 Cr.App.R. 83, C.C.A. 189

Randall, C.C.A. 435
Reid, C.C.A. 276
Rhodes, C.C.A. 122
Rice, C.C.A. 630
Ross, C.C.A. 127
Rowbotham, Q.S. 429
Rustislave Tchernikeese, C.C.A. 365

Sansbury [1959] 1 W.L.R. 1091; 124 J.P. 1; 103 S.J. 941; [1959] 3 All E.R. 472n.; 44 Cr.App.R. 14 120
Sales-Matic *v.* Hinchcliffe [1959] 1 W.L.R. 1005; 103 S.J. 834; *sub nom.* Sales-Matic *v.* Hinchliffe, 123 J.P. 546; [1959] 3 All E.R. 401, D.C. 58
Salmon, *The Times*, October 5, 1960, C.C.A. 845
Scarrott, *The Times*, October 4, 1960, C.C.A. 844
Schaffer, C.C.A. 124
Schneider *v.* Dawson [1959] 3 W.L.R. 960; 124 J.P. 7; 103 S.J. 962; [1959] 3 All E.R. 583, D.C. 121
Semple, C.C.A. 433
Shacter [1960] 2 W.L.R. 258; [1960] 1 All E.R. 61, C.C.A. 186
Shakeshaft, Smith and Suttie, C.C.A. 207
Sharpe and Stringer (1938) 26 Cr.App.R. 122 117

Smith *v.* Hughes [1960] 1 W.L.R. 830; 104 S.J. 606; 124 J.P. 430; [1960] 2 All E.R. 859, D.C. 709
—— [1960] 3 W.L.R. 92; 104 S.J. 510; [1960] 2 All E.R. 450 491
——, *The Times*, December 15, 1959, C.C.A. 185
Spraggett, *The Times*, October 4, 1960, C.C.A. 840
Stally [1960] 1 W.L.R. 79; 124 J.P. 65; 104 S.J. 108; [1959] 3 All E.R. 814, C.C.A. 199
Stewart *v.* Paterson, 1959 S.L.T.(Sh.Ct.) 66 196
Stewart and Harris, *The Times*, November 10, 1959, C.C.A. 57
Stewart and Harris 208
Stirling *v.* Associated Newspapers, Ltd., and Another, 1960 S.L.T. 5 (High Ct. of Justiciary) 265
—— *v.* H.M. Advocate (High Ct. of Justiciary) 567
Summerton, C.C.A. 276

Taylor *v.* Rogers [1960] 124 J.P. 217, D.C. 271
Theo, C.C.A. 124
Touhey, *The Times*, October 17, 1960, C.C.A. 843

Vaughan *v.* Biggs [1960] 1 W.L.R. 622; 124 J.P. 341; 104 S.J. 508; [1960] 2 All E.R. 473; 58 L.G.R. 218, D.C. 561

Wainwright (1960) 44 Cr.App.R. 190, C.C.A. 494
Waller, Hutton and Artis, C.C.A. 759
Wardrope, C.C.C. 770
Weatherell, *The Times*, January 26, 1960, C.C.A. 203
Welham [1960] 2 W.L.R. 333; 124 J.P. 156; 104 S.J. 108; [1960] 1 All E.R. 260; 44 Cr.App.R. 79, C.C.A. 189
—— *v.* D. P. P. [1960] 2 W.L.R. 669; 124 J.P. 280; 104 S.J. 308; [1960] 1 All E.R. 805; 44 Cr.App.R. 124, H.L. 423
White (1959) 103 S.J. 814, C.C.A. 132
Whitfield, C.C.A. 371
Wilde, Ward, Wooley, Morrey and Copley, Leeds Assizes 116
—— *v.* Russell (1933) 149 L.T. 190 564
Willis [1960] 1 W.L.R. 55; 124 J.P. 111; 103 S.J. 1029; [1960] 1 All E.R. 331; 44 Cr.App.R. 32, C.C.A. 56
Wright, C.C.A. 366, 440
Woodbury Licensing JJ., *ex p.* Rouse [1960] 1 W.L.R. 461; 124 J.P. 302; 104 S.J. 351; [1960] 2 All E.R. 205, D.C. 496

Yakimovitch, C.C.A. 66
Young *v.* Day 430

Table of Orders

Judicially considered or digested

S.I. No. Page
1957,
No. 13...646
1095...219
1958,
No. 659...377
1959,
No. 1936...144
1941...143
1942...142
1964...143
1994...143
1995...143
1999...143
2009...141
2021...221
2052...143
2053...144
2078...222
2088...143
2102...217
2103...217
2104...142
2105...143
2106...141
2108...141
2110...219
2117...219
2175...220
2181...220
2211...217
2212...217
2231...221
2238...217
2239...217
2252...220
2253...220
2257...220
2258...219
2259...219
2296...221

S.I. No. Page
1960,
No. 63...281
87...279
105...279
144...281
167...283
169...282
191...282
192...282
214...282
219...282
228...377
233...280
255...280
256...280
258...280
259...280
260...280
261...280
270...284
277...280
309...377
369...377
395...376
398...375
406...377
438...376
551...442
554...442
555...442
594...443, 851
595...444
678...443
693...501
698...500
699...501
712...502
713...502, 577

S.I. No. Page
1960,
717...501
726...502
727...502
760...499
762...500
763...500
764...500
793...499
828...574
870...577
889...577
890...577
896...575, 645
897...575
911...574
912...574
923...576
993...575
1014...576
1022...576
1023...577, 647
1024...576
1050...648
1063...645
1083...648
1096...646
1098...645
1099...646
1119...648
1132...645, 851
1151...646
1198...716, 781
1199...779
1208...719
1260...713

S.I. No.
1960,
1268..
1299..
1302..
1319..
1347..
1365..
1411..
1424..
1431..
1443..
1506..
1524..
1538..
1540..
1556...
1557...
1582..
1601...
1602...
1605...
1622...
1698...
1701...
1708...
1720...
1721...
1734...
1735...
1736...
1737...
1748...
1773...
1775...
1776...
1779...
1781...

THE
CRIMINAL LAW
REVIEW

January 1960

Programme for 1960

The scope of the *Review* will continue to be as in previous years. Among the features planned for the year we mention the following.

Captain Athelstan Popkess will be writing three or four articles giving the police viewpoint on present law and proposals relating to police work ; the first of these articles appears at page 14, *post*, Detective Inspector George Price of the Home Office Forensic Science Laboratory at Nottingham will be contributing some articles on ballistics and Dr. Wilson Harrison will continue to write for us on forgery and related subjects. We shall continue to illustrate articles on forensic science by the inclusion of photographs.

Among our legal articles we shall be publishing one on the Mental Health Act, 1959, by Dr. J. D. J. Havard ; an article on confessions as evidence by Dr. Rupert Cross ; a consideration of police questioning, the judges' rules and the courts by Mr. Ian Brownlie of Nottingham University, and an article by Mr. R. D. Margrave-Jones, whose articles on " Taking Other Offences into Consideration " aroused much interest among readers, on the law relating to pleas of " *autrefois convict* " and " *autrefois acquit*."

Mr. Christopher Williams will be concluding his series " Prosecuting Officer " prior to its publication as a book later this year, and we shall continue to attend Mr. Sutterthwick's court in the company of Mr. A. E. Jones.

Telephone " tapping "

Telephone " tapping " is a contemporary dirty word like " Empire." Its use has bedevilled consideration of a recent case where a police shorthand note of a telephone conversation was produced in disciplinary proceedings before the General Medical Council as evidence of a doctor's adulterous association with a woman patient.

The conversation was overheard not by "tapping" the line of the doctor concerned, but by listening in on a switchboard in the house from which the call was made with the consent of the other party to the conversation. The police made the arrangements for listening to this conversation in the course of their inquiries into the circumstances of a woman's death. In listening to the conversation the police were acting within their powers.

The record taken of the conversation was called in evidence by the General Medical Council, who learnt of its existence from the other party to the conversation, who was giving evidence before them, and subpoenaed the police to produce it. The Home Secretary was consulted on the question whether privilege should be claimed and came to the conclusion, after listening to the advice of the Law Officers of the Crown, that, on balance, it was in the interests of liberty that he should not claim privilege on this occasion.

Criticism has often, in the past, been levied at the Government for claiming Crown privilege. In this case, however, the criticism is for failure to claim Crown privilege and, thereby, failing to comply with the spirit of the recommendations of the Committee of Privy Councillors which, two years ago, was asked to advise the Prime Minister on the issues arising out of the handing over, on the instructions of the then Home Secretary, of transcripts of private telephone conversations to the General Council of the Bar in connection with disciplinary proceedings against a member of the Bar. The conversations had been recorded and the transcripts made and given to the police in pursuance of a warrant issued by the Home Secretary to the Postmaster-General.

The Committee recommended [1] that the practice of intercepting private telephone conversations should be most stringently regulated; in particular, that it should be used only under a warrant issued in individual cases and then only in the investigation of espionage and of serious crime where other methods had failed or would be unlikely to succeed. The Committee also recommended that the information acquired should be rigorously confined to the purposes which convinced the Home Secretary that it was right to issue the warrant in the first place.

It must, however, be repeated that this case is clearly not on all fours with the *Marrinan* case which gave rise to these recommendations. There was no telephone "tapping" in this recent case, and, it is submitted, Crown privilege should be claimed rarely and only in exceptional circumstances.

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[1] Cmnd. 283.

Contempt of court

The recent case in which the editor and publishers of the *Scottish Daily Mail* were fined a total of £5,500 for contempt of court for publication of material prejudicial to the fair trial of a man accused of murder has defined very clearly the Scottish law on this question.

The complaint by the accused man, who had been arrested for murder but not, at that time, committed for trial, arose out of the publication of a photograph of the accused with an article containing statements by persons who might be called as witnesses at his trial.

The Lord Justice-General, Lord Clyde, who sat with Lord Carmont and Lord Russell, said, after making it quite clear that the fact that the accused had not yet been committed for trial did not affect the issue, that there was no room in the Scottish system for a sort of preliminary trial by a newspaper feeding its readers pieces of evidence. Even a request to the Press by the police for assistance, accompanied by the communication of evidence, would not create justification for a newspaper conducting an independent investigation and publishing it.

" If a newspaper arranges an interview with any person in any way involved in the suspected crime and then publishes the result of that interview or an article based upon it, the newspaper is doing something which in all probability will interfere with the course of justice and hinder a fair trial."

That was because the person interviewed might be a witness ultimately at the trial and jurors could read or hear of it before the trial.

" Taking statements from witnesses is a skilled job if the statement is to contain the whole truth, and a search for sensation is seldom a sound approach for ascertainment of the whole truth.

" All criminal investigations and all interrogation of possible witnesses must be done exclusively by the criminal authorities and the result must only be published to the world when the ultimate trial takes place."

The publication of photographs had an equal tendency to prejudice fair trial where questions of identification might be involved.

A full apology was rendered for the article and photograph on behalf of the editors, printers and publishers.

Criminal Case and Comment for 1959

We are again publishing in volume form the reports of cases which have appeared in the *Review* for 1959, with revised and amplified commentaries by Professor J. C. Smith.

Once again the volume is offered at a reduced rate to present subscribers to the *Review*. An order form will be found facing the Calendar.

Judicial appointments

Fenton Atkinson, Esq., Q.C., has been appointed a Commissioner of Assize on the Wales and Chester Circuit.

John Brooke-Willis, Esq., has been appointed Recorder of the Borough of Huddersfield.

John Passmore Widgery, Esq., O.B.E., T.D., Q.C., has been appointed Recorder of the Borough of Hastings.

Richard Marven Hale Everett, Esq., Q.C., has been appointed Recorder of the Borough of Deal.

Central Criminal Court: appointments

The following appointments have been made at the Central Criminal Court:

Mr. J. M. G. Griffith-Jones to be First Senior Prosecuting Counsel to the Crown;

Mr. E. J. P. Cussen to be Second Senior Prosecuting Counsel;

Mr. J. H. Buzzard to be Third Senior Prosecuting Counsel;

Mr. S. A. Morton to be First Junior Prosecuting Counsel;

Mr. J. C. Mathew to be Second Junior Prosecuting Counsel; and

Mr. M. Corkrey to be Third Junior Prosecuting Counsel.

The Interpretation of the Homicide Act, 1957

By D. W. ELLIOTT, LL.B., *Solicitor*,
Lecturer in Law in the University of Manchester

The Homicide Act has now been on the statute book for upwards of eighteen months, and its effect has been considered in nearly twenty reported cases, most of them in the Court of Criminal Appeal. Although the wording of the Act has not yet been exhaustively examined by the courts, and many thorny problems of construction and application remain unsolved, it seems not inappropriate to attempt a " progress report " on judicial interpretation of the Act up to the present date.

Constructive malice

In *R.* v. *Vickers*,[1] section 1 (1) of the Act has been so fully considered by a strong Court of Criminal Appeal consisting of seven judges that it is unlikely ever to give rise to any further problems of interpretation. Indeed, in spite of the *furore* which raged in and out of Parliament around the court's decision and the Attorney-General's refusal of his *fiat* for an appeal to the House of Lords, it is suggested that the point taken in *R.* v. *Vickers* never had any substance, and that the meaning to be attached to the words of the subsection was at all times free from serious doubt.

Vickers [2] was convicted of capital murder, having broken and entered a house bent on stealing and having killed the aged householder by kicking her and striking her many blows. Since it could hardly be contended that the killing was not in the course of theft, the point taken for the accused on appeal was that the killing was not murder at all. Subsection (1) provides:

> " Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence."

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[1] [1957] 2 Q.B. 664.

[2] Further and fuller discussions of this case may be found at [1957] Crim. L.R. 575; *ibid.*, 614; [1958] Crim.L.R. 15 *et seq.*; *ibid.*, 714 *et seq.*; 20 M.L.R. 633; 73 L.Q.R. 464.

It was argued that the "other offence" which is referred to in the section was the inflicting of grievous bodily harm on the victim. This was to be ignored, and the killing was only to be murder if an intent to kill was proved. Such intent could not be implied from the nature of the blows inflicted on the victim, since they amounted to the offence of inflicting grievous bodily harm, which was to be ignored. The court rejected this and held that in Vickers' case the other offence which was to be ignored was the burglary. Ignoring the burglary, was there sufficient malice aforethought, express or implied, to make the killing murder? Clearly there was, because he intended to cause the deceased grievous bodily harm. In short, the Act abolishes both forms of constructive malice (*i.e.*, an intent to commit a felony of violence and an intent to resist an officer of justice[3]) but it makes no other change in the law of malice aforethought. In particular, as suggested earlier in this *Review*,[4] an intent to cause grievous bodily harm is still sufficient to make a killing murder.

Diminished responsibility

Section 2, which introduces the defence of diminished responsibility into the law of murder, has been more considered by the Court of Criminal Appeal than have all the other sections of the Act put together. Yet, surprisingly enough, the very heart of the section, *i.e.*, the meaning to be given to the words "abnormality of mind" and "mental responsibility," has been the subject of a striking and well-nigh unique judicial refusal to offer any firm guidance at all. In *R.* v. *Spriggs*[5] prosecution and defence advanced rival submissions as to the meaning to be given to those expressions. Notwithstanding this, the judge, instead of giving the jury a direction on the matter, merely handed to them slips of paper with the words of the section written on them, and instructed them that it was for them to say whether the case came within the section's terms.[6] The course the judge took was approved by the Court of Criminal Appeal,[7] Lord Goddard C.J. remarking,[8] "When Parliament has defined a particular state of things . . . it is not for judges to re-define or to attempt to define the definition."[9] On this one can only say that the judges have not usually been so humble.[10]

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[3] See s. 1 (2).

[4] [1957] Crim.L.R. 283.

[5] [1958] 1 Q.B. 270.

[6] Donovan J. seems to have taken the same course in *R.* v. *Bastian* [1958] 1 W.L.R. 413.

[7] Which has been criticised for so doing; see [1958] Crim.L.R. 191; 21 M.L.R. 318; but for support of the decision, see 74 L.Q.R. 173.

[8] [1958] 1 Q.B. 274.

Although, in its new-found humility, the Court of Criminal Appeal will not presume to say what amounts to "abnormality of mind" or "mental responsibility," it is apparently prepared to say that unchallenged evidence of extreme mental disorder is proof of diminished responsibility. Consequently, it was held in *R.* v. *Matheson*,[11] a verdict of murder in such circumstances will be set aside as being against the weight of evidence—at any rate if there is no proof of surrounding circumstances which could displace or throw doubt on the medical evidence.[12] Moreover, although it is open to a judge to refrain from giving the jury any guidance as to the meaning of the terms in the subsection, it has been held that it is not a misdirection if he does "point out to them by way of illustration or explanation the sort of thing for which they could look in order to see whether the case came within the section."[13] In *R.* v. *Di Duca*[14] the Court of Criminal Appeal was invited but declined to consider whether the transient effect of alcohol could amount to mental abnormality so as to raise the defence of diminished responsibility.

Onus of proof. Subsection (2) of section 2 places the onus of proving diminished responsibility on the accused. The standard of proof required to discharge this onus was considered in the Court of Criminal Appeal in *R.* v. *Dunbar*,[15] and, not surprisingly in view of *R.* v. *Carr-Briant*,[16] it was held that the civil standard applies; *i.e.*, the accused discharges the onus and is entitled to a verdict of manslaughter if he persuades the jury that it is more probable than not that, at the material time, he was suffering from such abnormality of mind as brings him within the section. He does not have to prove this proposition beyond reasonable doubt, and if this is not made clear in the charge to the jury, a conviction of capital murder will be set aside and one of manslaughter substituted. In a matter which makes the difference between a capital sentence and a sentence of imprisonment the court will apparently not apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, and dismiss the appeal even though the evidence led at the trial was such that the jury, properly directed, would still have found against the accused on this issue.[17] Presumably it would be different if the conviction were of non-capital murder. It should perhaps be added that if there is no acceptable evidence of any mental disorder, the judge must withdraw the issue from the jury, and in such a case a direction about the standard of proof required of the accused will be inappropriate and unnecessary.[18]

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[9] See also the direction to the jury of Edmund Davies J. on the meaning of "in the course or furtherance of theft" in *R.* v. *Stokes* [1958] Crim.L.R. 688, referred to below, p. 11.

[10] One reason advanced for this judicial abdication of the duty of construing statutes as a matter of law, is that the expression "such abnormality of mind . . . as substantially impaired his mental responsibility" connotes a question of degree, and questions of degree are questions of fact in each case; see Hilbery J. in *R.* v. *Walden* [1959] 3 All E.R. 203, at p. 204.

[11] [1958] 1 W.L.R. 474.

[12] *Cf. R.* v. *Rivett* (1950) 34 Cr.App.R. 87.

[13] *R.* v. *Walden* [1959] 3 All E.R. 203, *per* Hilbery J. at p. 205.

[14] [1959] Crim.L.R. 782.

[15] [1958] 1 Q.B. 1.

[16] [1943] K.B. 607.

Sentence. As has been pointed out in this *Review*,[19] it is a weakness of section 2 that it provides that a person who successfully pleads diminished responsibility is to be convicted of manslaughter, for which no minimum punishment is set. This weakness has been somewhat mitigated by the fact that, as far as appears from reported cases, most judges seem to have taken their cue from Glyn-Jones J., who, in a case heard very soon after the Act came into operation,[20] sentenced such a prisoner to life imprisonment on the ground that thus the question of his release could be kept under review by the Home Secretary. In *R.* v. *Dunbar* [22] when the Court of Criminal Appeal substituted a verdict of manslaughter for one of murder, it imposed a life sentence, and in *R.* v. *Matheson* [23] one of twenty years' imprisonment.

This tendency should discourage pleas of guilty to manslaughter on the grounds of diminished responsibility being made by accuseds charged with non-capital murder, but in any case, according to the court in *R.* v. *Matheson*, such pleas of guilty should not be accepted. The issue must be left to the jury, and if the defence asks for a verdict of manslaughter on some additional ground, such as provocation, a jury finding a verdict of manslaughter must be asked whether their verdict is based on diminished responsibility or on the other ground or on both.[24]

Until recently, the issue as to whether the accused is insane within the meaning of M'Naghten rules has invariably been raised by the defence. However, in *R.* v. *Kemp*,[25] Devlin J. held that where the prisoner pleaded, not insanity, but automatism, the

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[17] *Per* Lord Goddard C.J. [1958] 1 Q.B. 1, at p. 12.
[18] *R.* v. *Di Duca* [1959] Crim.L.R. 782.
[19] [1957] Crim.L.R. 283.
[20] *Daily Telegraph*, April 27, 1957; [1957] Crim.L.R. 349.
[22] [1958] 1 Q.B. 1.
[23] [1958] 1 W.L.R. 474.
[24] *R.* v. *Matheson* [1958] 1 W.L.R. 474, at p. 479.
[25] [1957] 1 Q.B. 399.

Crown could argue that the evidence showed insanity under the M'Naghten rules. In *R.* v. *Bastian*,[26] the accused pleaded, not insanity, but diminished responsibility, whereupon it was held by Donovan J. that once the defence put in issue the state of the accused's mind, it was the duty of the Crown, if it could, to cross-examine the defence witnesses and adduce rebutting evidence to show that the accused was at the time of the act insane within the meaning of the M'Naghten rules. He also ruled that in such a case it is for the Crown to satisfy the jury that the accused's mental condition went beyond being a case of diminished responsibility but was insanity. He did not say whether the standard imposed on the Crown on such an issue would be proof beyond reasonable doubt, or merely on the balance of probabilities, but it has been suggested [27] that proof beyond reasonable doubt should be insisted on. As has been pointed out,[28] as a result of *R.* v. *Bastian*, one gets the strange position that the defence is seeking a conviction (for manslaughter) and the Crown is contending for what is technically an acquittal (guilty but insane). The paradox is explained when it is remembered that in most of these cases the accused, but not the public at large, would find a conviction of manslaughter more acceptable than a verdict of guilty but insane, which might entail life-long detention. Be that as it may, the converse procedure was adopted in a case before Elwes J., *R.* v. *Nott*.[29] Here, the defence being insanity, the Crown was allowed to cross-examine and to call rebutting evidence to show that the accused was not insane within the meaning of the M'Naghten rules and that the proper verdict was manslaughter on the grounds of diminished responsibility.

Where a mental defective, who was under 21, was found guilty of manslaughter on the grounds of diminished responsibility and sentenced to imprisonment for life, an attempt was made on appeal to say that in view of section 17 of the Criminal Justice Act, 1948, and section 8 of the Mental Deficiency Act, 1913, the proper sentence was an order under section 8. Section 17 provides that no court shall impose a sentence of imprisonment on a person under 21 years of age unless it is of opinion that no other method of dealing with him is appropriate. Section 8 allows a court, if satisfied that a convicted person is a defective, to make, in lieu of sentence, an order that he be sent to an institution or placed under guardianship. However, the Court of Criminal Appeal, in *R.* v. *Speake* [30] held that as section 17 clearly allows a court to imprison the accused if satisfied that there is no other appropriate way of dealing with him, and as section 8 is permissive only, the matter is one for the discretion of the trial court; and the Court of Criminal Appeal refused to interfere with the sentence. The practical importance of this is that a person sentenced to life imprisonment may not, whereas a person detained under the Mental Deficiency Act may, be released without the consent of a Secretary of State.

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[26] [1958] 1 W.L.R. 413.

[27] [1958] Crim.L.R. 393.

[28] *Ibid.*, p. 392.

[29] (1959) 43 Cr.App.R. 8; [1959] Crim.L.R. 365.

[30] [1957] Crim.L.R. 683.

Provocation

One object of section 3 was to get rid of the requirement laid down in *Holmes* v. *D. P. P.*[31] that provocation, to be sufficient to reduce a charge of murder to manslaughter, must be by deeds, not words. Another object was to redefine the functions of judge and jury with regard to provocation, and to relax to some extent the judge's power to withdraw the defence from the jury. It is therefore left solely to the jury to say whether the provocation suffered by the accused was sufficient to cause a reasonable man to do as the accused did, and in this regard they are to pay attention to anything either done or said.

There have been two reported cases of oral provocation producing a verdict of manslaughter. The first was *R.* v. *Simpson*,[32] a case of the strangling by a husband of an endlessly nagging wife. The other was *R.* v. *Fantle*,[33] a case tried before Salmon J. in the Central Criminal Court. The accused went to see his wife's lover and after being taunted and otherwise treated with contempt by the lover, shot the latter dead. Salmon J. directed the jury to consider whether anything done or said by the deceased had caused in the accused a sudden and temporary loss of self-control so that for the moment he was not master of his own mind. But they had further to consider whether a reasonable man, similarly placed, would, by reason of the deceased's actions or words, suffer such a breakdown in self-control.

As enjoined by the section, the judge left the second issue entirely for the jury; but he also seems to have done the same on the former issue as to whether accused actually was provoked. The evidence showed that prior to the interview the accused purchased a revolver, with the confessed object of shooting the deceased, and he took the revolver with him to the fatal interview. He said that before entering the deceased's flat he had abandoned any intention to kill and during the course of his interview with the deceased "did not think of the weapon in his pocket."[34] In view of earlier cases, one would have thought that the jury could have been instructed to take account, in deciding whether the prisoner was so provoked as to lose his self-control, of such factors as the degree and method of violence which produced the death and in particular "whether the prisoner had shown thought contrivance and design in the mode of possessing himself of the weapon."[35] Apparently no such instruction was given, yet it is difficult to see how the section has made any change in the law except to allow the jury alone to say whether a reasonable man would have done the same in similar circumstances; it makes no change in the rule that the evidence must show actual loss of self-control in the accused.

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[31] [1946] A.C. 588.

[32] [1957] Crim.L.R. 815.

[33] [1959] Crim.L.R. 584; *The Times*, September 26, 1958.

Capital murder

The only provision relating to a capital murder which has been the subject of judicial consideration[36] is section 5 (1) (*a*), which provides that "any murder done in the course or furtherance of theft" shall be capital. It had been suggested[37] that once a theft is made complete by the asportation of the goods stolen, a subsequent murder could not be "in the course or furtherance of" the theft, and therefore could not be capital under this provision. However, the court seems to have rejected this literal approach in favour of a more common sense one. In *R.* v. *Stokes*,[38] Edmund Davies J. is reported to have advised the jury that a case which they would probably think would be clearly murder in the course of theft would be where a man burgled a house and then, just when he is in the very act of putting the swag into his bag, he is disturbed by the householder and murders him.

In *R.* v. *Jones*[39] the accused had burgled a store, taken some money from the safe and put it in his pocket, when the store manager entered the building. When the manager came up the stairs, the accused struck him a fatal blow. He was convicted of capital murder, but appealed on the ground that his defence with regard to capital murder had not been put to the jury. This defence was that his theft was complete, in that he had already, by the time he was interrupted, decided not to steal anything else that night, and that therefore the killing was not in the course of theft. The Court of Criminal Appeal held that even if the point that he meant to steal no more had not been made clear to the jury, it did not matter because " the prisoner was caught red-handed at the scene of the theft and in order to avoid detection he committed murder. It is difficult to see why that should not be within the words ' in the course . . . of theft '." [40] The plain reply to that is that if words are given their ordinary meaning, it is, on the contrary, difficult to see how that can possibly be within the statutory words. Lord Parker C.J. quoted with approval a dictum of Lord Sorn in a Scots case [41] that it would be ridiculous to make it capital if a burglar killed in order to go on thieving, but non-capital if the burglar murdered in order to run away. The position may well be thought ridiculous, but it is the result of plain statutory words, and one would have thought that a man being tried for his life would be able to insist on strict interpretation of those words.

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[34] [1958] Crim.L.R. 783.

[35] *Per* Tindal C.J. in *R.* v. *Hayward* (1833) 6 C. & P. 157, at 159; see also the speech of Viscount Simon in *Holmes* v. *D. P. P.* [1946] A.C. 588.

[36] There have been two convictions under s. 5 (1) (*d*) (murder of a police officer in the execution of his duty): *R.* v. *Marwood* [1959] Crim.L.R. 784 and *R.* v. *Podola* [1959] 3 W.L.R. 718. In neither of these cases was the court called upon to consider the relevant statutory wording.

[37] *Russell on Crime*, 11th ed., pp. 554, 615; Kenny, *Outlines of Criminal Law*, 17th ed., p. 146.

[38] [1958] Crim.L.R. 688.

[39] [1959] 1 Q.B. 291; and see *R.* v. *Di Duca* [1959] Crim.L.R. 782 where the accused had put the stolen money in his pocket before being accosted by the owner, whom he then killed.

It should be noted that it has not been laid down that a jury must be directed that a man who kills when caught red-handed kills in the course of theft. This is another field where the jury are apparently left in sole charge, the judge confining himself to modest suggestions which they are free to reject if they wish.[42] Counsel for the accused in *R.* v. *Jones* complained that a direction of law should have been given that if the theft was complete, the murder was not in the course of theft. Without calling upon the Crown to reply, the Court of Criminal Appeal rejected this submission; but it did not say that the jury must be directed in the contrary sense. It approved Lord Sorn's direction: " If it was in the course of theft and he did the killing, it is ' in the course of ' within the meaning of s. 5 of the Homicide Act and I so direct you in law," which seems to leave the matter to the common sense of the jury. It ought to be added that Lord Parker C.J. was careful to point out [43] that the court was not concerned with the words " in furtherance of theft." The meaning of this phrase remains to be clarified (if that word is appropriate to describe the Court of

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[40] *Per* Lord Parker C.J. [1959] 1 Q.B. 291, at p. 295.

[41] *H.M. Advocate* v. *Graham*, 1958 S.L.T. 167.

[42] See the charge to the jury of Edmund Davies J. in *R.* v. *Stokes* [1958] Crim.L.R. 688.

[43] [1959] 1 Q.B. 296.

Criminal Appeal's assistance in these matters) on some other occasion.[44]

Repeated murders

Section 6 retains the death penalty for those who are convicted of two murders done on different occasions. It also provides that no rule of practice shall prevent two or more murders being charged in the same indictment or (unless separate trials are desirable in the interests of justice) prevent their being tried together. Although the cumulative effect of evidence given at one trial relating to two or more murders will obviously be grossly prejudicial to the accused, the Court of Criminal Appeal has held that where the evidence relating to one murder is admissible on a trial for the other or others, the interests of justice do not require separate trials. This was decided in *R.* v. *Wilson*,[45] a case of a woman who was charged with murdering her second and third husbands, both of whom died within a fortnight of marriage with the prisoner, and in both of whose bodies traces of phosphorus were found. In accordance with the earlier authorities,[46] on the trial of the accused for either of these murders, evidence relating to the other death would be admissible as "similar fact" evidence to show system. This is because in the circumstances the probative force of the similar fact evidence is so great that the evidence must be admitted despite the prejudice to the prisoner. The Court of Criminal Appeal therefore approved the trial judge's decision to try both charges together.

Appeal

Finally it must be noted that there can be no appeal against sentence of life imprisonment on a conviction of non-capital murder because the sentence is one fixed by law, *viz.*, s. 9 (1) of the Homicide Act.[47] Applications for leave to appeal from convictions of non-capital murder will be treated as applications and not, as formerly with convictions of murder, as final appeals.[48]

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[44] In *R.* v. *Chrimes* [1959] Crim.L.R. 780 a conviction of capital murder was obtained where C. murdered someone on an expedition on which he hoped and intended to steal, although he had not actually penetrated the house in which was the money upon which he had designs.

[45] [1958] Crim.L.R. 475.

[46] See, *e.g.*, *R.* v. *Smith* (1915) 11 Cr.App.R. 229; *Makin* v. *Att.-Gen. for New South Wales* [1894] A.C. 57, *per* Lord Herschell L.C. at p. 65.

[47] *Practice Direction (Non-Capital Murder)* [1959] 1 W.L.R. 750.

[48] *Ibid.*

Should the Police Fine Offenders on the Spot?

By CAPTAIN ATHELSTAN POPKESS, C.B.E.

> *"The police and the courts are over-occupied with motoring offenders. Why not simplify the system? What is wrong with on the spot fines?"*

So writes the traffic correspondent of a daily newspaper. As to what is wrong, or otherwise, with on the spot fines, let us see.

Fifty years ago defendants in a court case invariably appeared before the justices in the areas in which they lived; personal appearance was the rule. The advent of the internal combustion engine, however, has almost completely changed the picture. Many offences are now committed by individuals who live far away from the areas in which the offence was committed. It has now therefore become common practice for the defendant not to appear in person. Indeed, it might be unreasonable to expect him to do so from a distance, and possibly lose wages, in a relatively unimportant case. Writing a letter to the court instead, or notifying his intention as regards attendance and plea on the appropriate form under the Magistrates' Courts Act, 1957, is now common practice. It has become quite normal for a defendant to be fined without his actually appearing in court. Another aspect of the matter, and an important one with the present police manpower shortage problem, is the need to reduce to the absolute minimum the calling of police witnesses. In spite of what has been done it is felt in many quarters that the fullest possible economy in this direction has yet to be achieved, especially in respect of minor motoring offences.

The present position, so far as proceedings up to and including conviction are concerned, regarding the attendance of witnesses is as follows:

(a) All prosecution witnesses must attend court: (i) If it is known that the defendant proposes to attend court and to plead "not guilty"; (ii) if it is known that the defendant proposes to attend court, but it is not known what his plea will be; and (iii) if it is not known whether the defendant proposes to attend court or not.

(b) None of the prosecution witnesses need attend court if it is known that the defendant will attend and that he will plead "guilty"—since on a plea of "guilty" the court can convict without hearing evidence; though it is the practice for someone to attend on behalf of the prosecution, in order to outline the circumstances of the offence to the court.

In recent years some steps towards saving the time of witnesses have been taken, the most notable of which has been the provision contained in the Magistrates' Courts Act, 1957, whereby a court may accept a plea of "guilty" from an absent defendant. While welcoming the saving of witnesses' time which this makes possible the police have found that operating the relevant provisions of the Act involves them in an enormous amount of additional "paper work." There have, however, been suggestions that a much more radical approach to the problem is necessary—that a remedy should be sought in a system of fining on the spot; and of standard penalties as has been done in some other countries. Since such a system might effect a still greater saving of witnesses' time and, at the same time, eliminate the great majority of the "paper work" which the present system involves the police must look with interest at such a proposal.

Under such a system certain offences are removed from the purview of the courts, if both its prosecutor and the accused so desire, and a monetary payment is made in settlement of the offence.

Overseas provisions

Broadly speaking, when we think of the constable on the beat imposing fines on the spot it is in terms of some system of issuing tickets. It is therefore interesting to see what is happening in some other countries. Such fines can be imposed on the spot in, among other countries, West Germany, Austria, Italy, Switzerland and Yugoslavia. A modification of the system is applied in the United States of America and in Canada. In most of these countries the system applies to all traffic offences except serious ones.

The nature of the fines which can be imposed varies: there is a uniform penalty in Austria; in Switzerland it varies in the different cantons; in Germany there is a maximum or standard penalty; in Italy the fine is reduced proportionately to what the cost of prosecution might have been; in Spain the town police officer levies the fine to a fixed scale but does not himself collect it.

In the U.S.A. the fine (treated in some cases, originally, as bail) is paid into court, except in certain towns where it must be paid at the Traffic Violations Bureau. In Spain it is paid at the municipal offices; in Switzerland at court or at a police station. In each instance the offender has the right to insist on the case going to court.

In the larger cities and states in the U.S.A. police officers are issued with a block of forms, in duplicate (rather like our own forms HO/RT/1). When they see minor motoring offences they are empowered to make out a form, in duplicate, inserting their own number, the registration number of the car, and the offence alleged. The original is then served on the alleged offender, possibly by affixing it to the windscreen of his vehicle, and there is a notice on it requesting the driver to appear in court at a specified time. In many areas he is then permitted to deposit with the court or with a traffic violations bureau (often through the nearest police headquarters) an amount of bail fixed in accordance with a schedule approved by the court. He may then elect to forfeit this bail in lieu of making his appearance in court. In some areas the deposit is accepted as a fine without resort to the legal fiction of " forfeiture of bail." But whether the legal fiction of " forfeiture of bail " is practised or not the effect of the system is that an offender can pay a fine of a predetermined amount (depending on the offence committed) directly or without a formal hearing in court. In the case of serious offences, or when the offender demands an immediate trial, or where there is reason to believe that the offender may leave the area and not appear in court or deposit bail, the officer may take him immediately before a magistrate. In any case if he ignores a notice requiring him to attend at the court or police station, or if he refuses to pay the penalty imposed, he may be brought before the court in the ordinary way. Though, in practice, this last seldom happens.

Although there are slight differences in points of detail in some countries, the basis of the system, which normally applies to all the lesser motoring offences, is that a police officer delivers to the motorist, or affixes to his vehicle, a ticket. This is, in effect, a summons notifying him that an offence has been committed and that the penalty is a certain amount, and that it can be paid to the police, the traffic authority, or the clerk of the court, as the case may be, but that the motorist has the right to insist on the case going before a court.

The penalty being payable before the return date of the summons which is stated on the notice, the court has power to impose a larger fine than the standard penalty, and in any event the defendant may become liable to pay costs if he claims to go to court and is then convicted.

Report on the Summary Trial of Minor Offences

With regard to whether or not there should be some system of imposing on the spot fines in the United Kingdom the Home Office Report of the Departmental Committee on the Summary Trial of Minor Offences,[1] dated July, 1955, reads: " Our witnesses were well-nigh unanimously opposed to any system whereby, with the consent of the prosecutor and of the defendant, cases could be settled without coming before a court. Their opposition was directed, not only to a system of fining on the spot, but also to a " ticket " system; or, indeed, to any extension of the present system of mitigated penalties. The opposition was largely based on the fact that such a proposal would make a fundamental change in the present system of administration of justice in this country.

In the first place, it was thought, the question whether a criminal offence had been committed would no longer be determined by a court of law, since there would be convictions by consent without any adjudication by a court. And in the second place, the fine or penalty imposed on the defendant would no longer be assessed by a court, which can have regard to all the circumstances of the case and is required by statute to take into account the means of the offender so far as they appear or are known to the court, but would be fixed according to some general scale, which might or might not be appropriate in the particular case concerned."

Which is not to say that any system of imposing fines on the spot has not some advantages, as well as the disadvantages set out above. For example, there would be the time and expense saved to courts, defendants, and the police. There would be saving of much paper work. Also the lengthy delay which now occurs between the commission of an offence and the court hearing would be obviated, not to mention the suspense which all this entails for the defendant.

Chief among the disadvantages would be the break with the tradition of the courts in this country, that they and nobody else should adjudicate as to guilt and penalty. That a defendant who considers himself innocent may be inclined to agree to settle the matter on the spot rather than involve himself in the time, trouble and expense which a court attendance and plea of " not guilty " would entail. It could also involve the police, etc., in the task of collecting fines—an arrangement hitherto generally considered undesirable and outside their province. Finally, it might conceivably give rise to temptation to bribery and corruption, as between offenders and those operating such an arrangement.

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[1] Cmd. 9524.

Does anything of this nature already exist in the United Kingdom? Under certain Acts relating to vehicle excise licences, for instance, the owner of a vehicle which has been seen to be in use without a current excise licence is liable to a penalty of £20, or else to three times the amount of the duty chargeable. But on receipt of the evidence of the offence the Local Taxation Authority may, instead of prosecuting the offender, offer him the opportunity of paying, within a prescribed time, a penalty less than that which, upon the facts of the case, the court might reasonably be expected to impose. If the offender accepts the offer and pays the "mitigated" penalty the need for court proceedings with all the time and expense involved by magistrates, defendants and witnesses is obviated. If the offender declines the offer, or else does not reply within the prescribed time, legal proceedings for the offence will normally be instituted against him.

Possible schemes

In the event of any acceptable system of fines on the spot being devised for operation in Britain it would be necessary to consider: (a) For what offences the system would be used; (b) by whom it would be enforced; and (c) by whom the scale of penalties would be fixed.

If such a system is eventually adopted, however, it could in its initial stages apply to those motoring offences which are created by Local Traffic Regulation Orders—such as those in connection with one-way streets; prohibition of waiting; unilateral waiting, etc. In such event it should be enforced by the police only, or police-controlled traffic wardens. That the penalties should be fixed by the Local Authority through its appropriate Committee, *i.e.*, the Watch Committee or Road Traffic Committee, etc. Such penalties would be graduated in accordance with: (i) The nature of the offence; (ii) place of offence; (iii) time of offence; (iv) time during which offence continued; and (v) the offender's previous similar convictions.

Suitable penalties could be collected on the spot, in accordance with any scale fixed by the Local Authority; (in this case it may not be possible to apply consideration (v) above in determining the penalty); or they could be collected by means of a ticket system, which could be operated by the enforcing officer, and the offender could be required to produce this ticket at the appropriate Department of the Local Authority, and to pay there the amount of the penalty indicated. Or the enforcing officer could report the facts to the Local Authority, who could then assess the fine and be responsible for collecting it from the offender.

In each case the enforcing officer could be issued with a supply of suitable forms (in duplicate) and numbered in consecutive order. In the case of an alleged offence he could complete one form (in duplicate), indicating thereon the time, day of the week, date, nature and duration of the alleged offence.

If fines are collected on the spot, or a ticket issued to the offender, the enforcing officer would also insert the amount of the penalty. The offender could then be required to indicate on the form whether he wished the offence to be dealt with by court process, or under the new procedure, and would sign the form. One copy could then be issued to him, and the other could be submitted to the appropriate Authority by the officer concerned. If the fine is actually paid on the spot, the form would be the offender's receipt.

If it were not possible to make contact with the offender at the time of the offence he could be readily traced through his vehicle registration number and later communicated with by post. If such a scheme as this were introduced in the United Kingdom personal records indicating offences and penalties in relation to them could be kept by the Local Authority, and should not form part of any person's criminal record. Such Local Authority records should then be referred to only in future cases of similar offences.

It is quite possible that a number of Chief Constables in the United Kingdom would support such a change in legislation as this, providing the police were relieved of the duty of collecting fines. For in few other countries in the world does such good relationship exist between the police and the public as in this country, and they are convinced that such relationship would suffer severely if the police were obliged to take on this duty.

In spite of the improvements effected by the Magistrates' Courts Act, 1957, there is still avoidable waste of the time of police and other witnesses attending court in " guilty " pleas.

One instance is where, although the defendant appears and pleads " guilty," the prosecution have not known in advance that he would so plead and have had to have their witnesses ready. Another is where, the summons having been despatched by registered post, no communication is received from the defendant, and the prosecution, being unaware of his intention as to attendance or plea, have arranged for their witnesses to attend. If then the defendant does not appear the summons must be treated as "not served," fresh process must be issued and personal service arranged. And at the end of it all the defendant may plead "guilty."

In each instance, if a system of fines on the spot, or its equivalent, had been operative, much time, trouble and expense could have been saved to prosecutor and witnesses.

The need to save such time, trouble and expense is urgent. Is some such scheme of fines on the spot, as has been outlined here, the answer?

Receiving Stolen Property

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The number of occasions upon which our courts of first instance have today to consider cases of petty larceny and of receiving stolen goods and property demands from both practitioner and student alike an intimate knowledge of these branches of our law. The recent decision in *Director of Public Prosecutions* v. *Nieser*[1] has once again drawn the attention of the academic lawyer to the problem of a section of our case-law which provides reading which is far from satisfactory on several points. If for these reasons alone, a reappraisal of the existing law on this subject would seem desirable. What in fact is it necessary to prove in order to secure a conviction for receiving stolen property?

At common law the receiving of goods which had been stolen with knowledge that they had in fact been stolen was treated as a misdemeanour. It was essential that the goods had been stolen, yet the actual receiver was not indictable as an accessory after the fact to this larceny because it was not the actual thief that he received but only the stolen goods. However, subsequent legislation, now embodied in the Larceny Act, 1916, has considerably widened the offence with which this article is concerned by extending it to cover cases where the original act of dishonesty was a stealing or obtaining of the property.

The precise wording of the provision will be found in section 33 (1) of the 1916 Act:

> "Every person who receives any property knowing the same to have been stolen or obtained in any way whatsoever under

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[1] [1959] 1 Q.B. 254.

> circumstances which amount to felony or misdemeanour, shall be guilty of an offence of the like degree (whether felony or misdemeanour). . . ."

It is suggested that on the basis of section 33 (1) there are four essential elements of this offence. In the first place it should be shown that at the time of receiving, the goods were still in the ① category of "stolen property," that is, they had not returned to their original owner. Secondly, the goods must have passed into ② the possession of the accused. Thirdly, it will be suggested that perhaps the question of knowledge, knowledge that the goods which he is taking into his possession are in fact stolen goods, is a basic ③ essential for the prosecution to prove. Finally we will discuss the question of the accused's intention to deprive the original owner of his rightful ownership of the goods or chattels.

Let us consider the first of these propositions, *viz.*, that at the time the goods were received by the accused they were "stolen" property.

"Stolen" property

In some cases it may be only too clear from the evidence of the manner in which the accused person took possession of the goods that they had been stolen, and the same evidence may well supply the necessary indication of his mental intent at the time. If the evidence should show that a shopkeeper who normally left his premises at 6 p.m. to return to his home 10 miles away returned one night having taken elaborate precautions to ensure that his friends and associates did not know of his whereabouts, and admitted a consignment of parcels by a back entrance to his premises, it would appear that the inference is clear. Yet again, should a company secretary take elaborate measures to erase from his accounts notice of the reception of certain goods consignments which had been stolen, it would not be very difficult to convince a jury that he knew that they had in fact been stolen.

Emphasis was placed as early as 1839 on the fact that the goods must have been already stolen. In *R.* v. *Gruncell and Hopkinson* [2] G. was indicted for stealing a quantity of hay, the property of his master, and H. with receiving it, knowing it to have been stolen. The facts showed that G., a carter, was permitted by his master a small quantity of hay for his horses. Apparently G. took from the stables two trusses of hay above the quantity which was allowed for the horses and during the subsequent journey H. had received the two trusses from G., and had carried them from the wagon to a stable.

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[2] (1839) 9 C. & P. 365.

It was submitted that H. had been wrongly indicted, that in fact he should have been charged with larceny. The hay, being in the master's wagon, was in law still in the master's possession and by removing it from its place H. had committed larceny. This argument was rejected on the grounds that the two extra trusses were not appropriated by the master for the horses, and consequently the act of larceny was complete the moment G. placed it in the wagon before his departure. Thus there had been a larceny, and what H. received was stolen property.

From the reports it is not clear exactly how much weight was attached to the question of H.'s knowledge, but it should be noted that the court attributed to G. the necessary *animus furandi* at the time he actually placed the hay on his wagon.

(It is interesting to note the court's reluctance to convict an accused without notice of his evil intention many years before they were faced by the Larceny Act, 1868).

Obviously a charge of receiving goods knowing them to have been stolen depends on a larceny committed by someone whom our law does not exclude from liability. It is suggested that X could not be convicted for receiving property from Y, a person of unsound mind. Y would be incapable because of his mental abnormality of forming the necessary *animus furandi*. Likewise the question of receiving goods stolen by a child has received consideration. In *Walters* v. *Lunt* [3] a mother and father were accused of receiving a child's tricycle from a child of seven. Delivering his judgment in the Divisional Court, Lord Goddard C.J. said:

> "In the case now before us the child could not have been found guilty of larceny because he was under eight years of age, and unless he is eight years old, he is not considered in law capable of forming the intention necessary to support a charge of larceny."

Consequently the respondents could not be convicted under section 33 (1) of the Act of 1916 of receiving stolen property because the property taken by the child was not property:

> ". . . stolen or obtained . . . under circumstances which amount to felony or misdemeanour. . . ."

The same principle was discussed on entirely different facts in *R.* v. *Creamer* [4] by the Court of Criminal Appeal. They held that the net effect of section 36 of the Act was that no crime was committed by a wife who took her husband's goods unless she took them when she was leaving, or about to leave him, and, consequently, a man who received from the wife property taken from her husband could not be convicted of receiving because the facts necessary to convict the wife of larceny from the husband (*viz.*, that she was actually leaving, or about to leave him) had not been sufficiently established.

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[3] [1951] 2 All E.R. 645.
[4] [1919] 1 K.B. 564.

Let us now turn to the proposition—at the time of receiving, the goods must have been stolen goods. In order to gain a conviction for receiving property knowing it to have been stolen, the Crown must show that at no time prior to the " reception " did the property concerned have recourse to the possession, either actual or constructive, of their owner. If this should be the case, then there will not be any crime in subsequently receiving them, for they will have ceased to be " stolen " property.

This feature was discussed at some length by the Court of Crown Cases Reserved in *R.* v. *Villensky*.[5]

A parcel was handed to the prosecutors, a firm of carriers, for conveyance to the consignees. While in the prosecutor's depôt, a servant of the prosecutor removed the said parcel to a different part of the premises and put on it a label addressed to the accused by a name by which he was well known. When the superintendent of the prosecutor's business was informed of this he directed that the parcel be replaced in the position where it had been put by the thief and to be subsequently sent by van, accompanied by detectives, to the given address. At that address it was received by Villensky under circumstances which clearly showed knowledge on his part that it had in fact been stolen.

The defence objected that on the facts there was no case to go to the jury, as at the time the parcel was received by V. it had ceased to be stolen property, the bailees having resumed actual possession of it. The court of first instance overruled this objection and V. was convicted of felonious receiving.

On appeal, the conviction was quashed on the express grounds that possession of the parcel had in fact returned to the carriers. Indeed Lord Coleridge C.J. even went as far as to declare:

> " I must confess that I cannot conceive of a case of resumption of possession if this is not one."

Pollock B., in agreeing with this judgment referred, albeit briefly, to the general and wider problem of prior detection and receiving:

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[5] [1892] 2 Q.B. 597.

> "It is, of course, frequently the case that when it is found that a person has stolen property he is watched; but the owner of the property, if he wishes to catch the receiver, does not resume possession of the stolen goods; here the owners have done so, and the result is that the conviction must be quashed. . . ."

There still remains the question of the mode by which property may return into the possession of the owner. In *R.* v. *King*[6] the facts were that a fur coat had been stolen and during their investigations the police had gone to a flat where they found B., who admitted the theft. While they were there the 'phone rang and acting on the instructions of the police B. told K. to "come along as arranged." When K. arrived he said that he had come for the coat, and when he received it the police arrested him. He was subsequently convicted for receiving property knowing it to have been stolen.

On appeal, however, his counsel raised the question—at the time K. received the coat from B. it was no longer stolen property, as it had been reduced into the possession of the police. *R.* v. *Villensky* was cited as authority for the proposition that any person in whom property is laid and who has himself or by his agent resumed possession of the stolen property before its receipt by the receiver negatives any liability of the receiver under section 33 (1).

But the court distinguished *Villensky* from *King* on the grounds that in the latter at the time of the final possession of the coat it had not been in the possession of the police.

Clearly, had the coat ever come into the possession of the police it would have ceased to be in the category of stolen goods, even though they allowed B. to hand it back to V.

From this case certain other problems arise. For example, did the police receive possession of the coat when B. handed them the package? At that moment they undoubtedly had the *corpus* of possession, as they exercised seemingly complete physical control over it. But, we may well ask, did they have the necessary *animus*?

It is submitted that the police did in fact gain possession of the parcel, and that the distinction drawn between this case and *Villensky* was inaccurate, to say the least of it.

What the court in this instance is saying is that the difference between the cases is between the resumption of possession by the carriers in *Villensky* and the taking of possession by the police in *King*.

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[6] [1938] 2 All E.R. 662.

It might well be argued that the police had not formed the necessary *animus* in the latter case to constitute possession. Humphreys J., in delivering the judgment of the Court of Criminal Appeal in *King*, said:

> " . . . the facts in this case fail to show that the stolen property had been reduced into the possession of the owner—which of course it had not been—or into the possession of the police, at the time when it was received by the appellant. . . . There is no doubt that in a very few moments it would have been reduced into the possession of the police, which would have been sufficient for the purpose of the legal argument, that it was no longer stolen property."

But what, then, is the real difference between a company inspector who, realising what is about to happen, examines a stolen parcel and sets a trap for the criminal and a policeman who examines a stolen coat and also contrives to " catch " the receiver?

What is always overlooked in this sort of discussion is the difference between legal and physical possession. Does retaking denote the reacquiring of legal possession or is the exercise of physical (*de facto*) possession sufficient? It is submitted that the former proposition is the correct answer and that it provides one explanation for distinguishing *King* from *Villensky*.

Another possible explanation would be that in one case the *novus actus* was committed by persons who had been given express authority to deliver the chattel, and therefore had greater claim to possession than a police officer who merely intervened in the merits of public justice. This suggestion, however, seems to fail if we accept the dicta of Humphreys J. in *King*:

> " . . . in a very few moments it would have been reduced into the possession of the police, which would have been sufficient for the purpose of the legal argument, that it was no longer stolen property."

Perhaps a more satisfactory explanation is that property does not necessarily pass into the possession of the owner when he knows where it is (as in *King*), while in *Villensky* the court considered that they had in fact passed into the possession of the owner or his agent. Even here doubt remains, for it may well be agreed that in *Villensky* the owner or his agent knew very well where the goods were—they in fact sent two detectives with the consignment on delivery. In *R.* v. *Mucklow* [7] it was held that a person who took possession of an envelope also took possession of its contents even though at the time of taking he did not know the exact nature of its contents, as he had intended to take possession of whatever was inside.

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[7] (1827) 1 Mood. 160.

Perhaps this case offers the closest analogy to *King*? There it could be suggested that the police intended only to claim the contents of the package if it contained the fur coat. But B., from the evidence, had already told them that it contained the said coat, even before he handed the parcel over. Supposing the statement was false, or the transfer of possession was dependent on the falsity or truth of such a statement, what would be the situation?

It still remains difficult to understand how the police failed to receive possession of the fur coat when B. handed it to them.

Possession

We now come to the question of possession: the goods must be shown to have come into the possession of the accused. It is essential to any act of receipt that there should be an act of receiving which involves a change of possession. It must be shown therefore that the prisoner took the goods into his possession, actual or constructive. This cannot of course be the case where the original thief retains exclusive possession of the goods. Much of the basis of our discussion would appear to lie in the leading case of *R.* v. *Wiley*.[8] Two men S. and W. were seen to enter the home of Wiley's father with a loaded sack. Later they came out with John Wiley, the accused, who led them into an adjoining barn, closing the door after them. When the police entered the barn they found the three men standing round the sack, as though bargaining, but no words were heard. The sack was found to contain poultry which had been stolen. When he was charged with receiving property knowing it to have been stolen, John Wiley said:

> "I do not think that I would have bought the hens."

The jury found S. and W. guilty of stealing the poultry and John Wiley guilty of receiving it knowing it to have been stolen.

It is worth noting in passing that although Wiley admitted knowledge of the contents he was subsequently acquitted by a majority decision of the Court of Crown Cases Reserved.

The Court of Criminal Appeal was not unanimous as to whether Wiley's conviction should stand and so the case was reargued before twelve judges. Of these four were for affirming the conviction and seven for quashing it. However, the chief interest of this case is the manner in which the court discussed the element of possession.

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[8] (1850) 2 Den. 37.

Platt B., in holding that the conviction of the quarter sessions was wrong, thought that the goods had not yet passed outside the dominions of the actual thieves. It would have been necessary to show that Wiley had obtained exclusive possession of the poultry to the exclusion of the possession of S. and W.

What would be the position if the court had considered that Wiley, S. and W. all had joint possession of the goods? Even here it is suggested different considerations would have arisen. The possession of Wiley would have differed from that of the others. His possession of the goods was dependent on the previous actions of W. and S. He himself had had no hand in the actual larceny. One of the most important elements of larceny would be lacking in his case, *viz.*, asportation.

Platt B. concluded:

> "I think that the thieves here retained the control and possession, and never intended to part with it until after their bargain was concluded."

The same problem occurred in the judgment of Parke B.:

> "Receiving must mean a taking into possession actual or constructive, which I do not think there was here . . . I think the possession of the thief must be distinct from that of the receiver; and that the mere receiving a thief with stolen goods in his possession would not alone constitute a man a receiver."

It is agreed that there may be joint possession of goods as between a thief and a receiver, but there does not appear to have been that element present here, from the evidence. However, an interesting point arose in the judgment of Patteson J., who also agreed that the original conviction should be quashed.

> "I do not consider a manual possession or even a touch essential to a receiving. But it seems to me that there must be a control over the goods by the receiver, which there was not here. . . ."

Here we have a new attitude towards possession—the actual physical handling of the goods being immaterial in receiving. This point became even clearer many years later in *Hawes* v. *Edwards*[9] where in fact the evidence of receiving was weaker. There thieves took the stolen goods in a parcel to the appellant's shop. The police entered immediately and found the parcel open on the counter. One of the officers asked the appellant:

> "Have you signed for this parcel?" and received the reply: "No, I am examining the contents before I sign for it."

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[9] (1949) 113 J.P. 303.

Lord Goddard C.J. in the Divisional Court, in quashing the conviction of the appellant for receiving stolen goods said:

> " *R.* v. *Wiley* is the leading case on the matter . . . so long as possession is in the thieves that negatives the possession of the person with whom they are bargaining. This is not a case, as it seems to me, of joint possession. It is a case in which a person has possession of the goods and is offering to transfer possession to another person, and that other person has not made up his mind whether to take possession or not."

There is perhaps one criticism of *Wiley* which should be noted. It has been suggested that there the prisoner had in fact taken an active part in transporting the fowls into the stable, well knowing that they were in the sack. It could be suggested that here we have at least two of the elements required for a conviction for receiving, *viz.*, the " active reception " and the necessary knowledge that the goods were stolen property. Against this we have evidence to show that Wiley only led W. and S. into the barn—he did not actually carry the sack, nor was it open when the police raided the barn. However valid this criticism may be, it is suggested that the dicta of Patteson J. is now accepted in our criminal law and bears closer examination than some judges and writers would indicate.

It is indeed interesting to note the attitude adopted by the Divisional Court in a recent case, *Hobson* v. *Impett*.[10] The defendant had appealed to the quarter sessions against his conviction for receiving, the facts being that the day after certain gold ingots had been stolen he helped his lodger P. to unload a sack containing some ingots and to take them into P.'s house. It was shown that at the conclusion of the unloading he knew that the sack contained the stolen articles. The next day he helped to load fifteen of the ingots into a car and in fact carried them from the house to the vehicle. He then travelled in the car as a passenger, but it was not proved that he had touched the ingots again or in fact took any part in offering them for sale.

The court of quarter sessions held that by taking up and carrying the ingots into the car the defendant was in manual possession of them and received them within section 33 of the 1916 Act. The defendant appealed and his conviction was subsequently quashed by the Divisional Court. A strong bench (Lord Goddard C.J., Hilbery and Donovan JJ.) held that a mere handling of the goods concerned did not necessarily amount to receiving, for there might be a picking up without a taking into possession.

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[10] [1957] Crim.L.R. 476.

This seems to establish that either physical custody is not necessarily possession in law or that legal as opposed to physical possession is necessary to sustain a charge of receiving. We have the example of the prospective customer handling goods in a shop. It would appear in *Hobson*, therefore, that the defendant was never in possession but merely had custody while he was actually carrying them.

It can therefore be assumed that some form of possession or actual dominion or control is necessary to constitute the crime of receiving. In *R.* v. *Watson* [11] it was held that where X merely assists in negotiations for the sale of property by A to B, although he knows it to be stolen, but never has control of it cannot be convicted of receiving. What is not certain is whether possession in the strict sense is necessary and that custody in some circumstances may not suffice. In *R.* v. *Gleed* [12] it was held that it was sufficient if the alleged receiver has had control over the stolen goods.

The facts in *Gleed* were not dissimilar to those in *Hobson*. The appellant was proved to have assisted the thief in lowering a stolen barrel of gin from a van to the ground. The court held that the mere fact of their having handled the cask together when lifting it from the van is some evidence of such joint possession. It is difficult to see why there should have been joint possession in *Gleed* if the reasoning in that case is accepted, and not joint possession in *Hobson*.

It could be argued that the distinction lies in the fact that in *Gleed* the defence admitted that in those particular circumstances the appellant had joint possession of the barrel sufficient to make him guilty of receiving. During the appeal in *Gleed* it was contended that the Deputy-Chairman did not deal with the case as one of joint possession but invited the jury to find that the appellant had "control" over the barrel. The court held that there was nothing lacking in this summing up. Does this not suggest that "control" even if it does not amount to possession, is sufficient?

In *Hobson* the facts seem to show that the accused was acting merely as a labourer or manual servant, working under the control and instructions of P. If such be the case it is difficult to see how he can be said to have control. It must be remembered, however, that it was not until he had completed the first part of his task, but before he ceased to play his part in the proceedings, that he knew he was handling stolen property. Reference will be made to this point later.

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[11] [1916] 2 K.B. 385.

[12] (1916) 12 Cr.App.R. 32.

A case reported in [1956] Crim.L.R. at 489, *R.* v. *Brooker*, gives an interesting contrast with what Patteson J. considered not essential in receiving in *Wiley*. Here again there is some similarity with the facts in *Gleed* and *Hobson*. A stole a vacuum cleaner from a flat, and B, knowing it had been stolen, helped A carry it into a shop. B was convicted by the magistrates for receiving and appealed to the Court of Criminal Appeal on the grounds that the jury had been misdirected on the question of receiving. The Chairman had told the jury:

> " There is evidence of receiving here and no contest about it; if you carry goods which are stolen or if you carry goods which are not stolen you receive them; you are in possession of them; you may be in joint possession with the more closely concerned person who is with you but you are in possession of them."

The appeal was allowed, and their Lordships ruled that the question of possession was a pure question of fact for the jury.

It should be remembered that the mere fact that goods which had been stolen were found on the prisoner's premises is not itself sufficient evidence that he received them or that they were in his possession because they might well have been placed there by the actual thief or some other person without his knowledge or assent. In *Ex p. Ransley* [13] the court saw fit to quash a conviction under the Adulteration of Tea and Coffee Act, 1724 (11 Geo. 1, c. 30), s. 16, for knowingly, harbouring and concealing three gallons of smuggled spirits on the ground that the mere fact of the spirits being found in defendant's house during his absence could not be considered as conclusive evidence of his knowingly harbouring them.

Where stolen property is found in a man's house the question as to whether it was there with his knowledge and sanction is a question for the jury.

We come now to the third essential requirement mentioned at the begining, *viz.*, knowledge that the property he was receiving was in fact stolen. According to section 33 (1) of the Larceny Act, 1916, it is essential that the accused should " know " that he is receiving stolen goods. Thus the prosecution must allege and must prove that the accused, at the actual time when he received the goods knew that they were stolen or obtained in circumstances amounting to a felony or misdemeanour.

In the recent case of *Director of Public Prosecutions* v. *Nieser* the question of knowledge and the receiving of property obtained by a misdemeanour was considered by a strong Divisional Court (consisting of Parker L.C.J., Streatfeild and Diplock JJ.), which decided that where a prisoner is charged with receiving property obtained under circumstances which amount to a misdemeanour it is sufficient to charge and prove that the receiver knew that the property fell into the general category of property obtained under circumstances amounting to a misdemeanour and it is unnecessary to show that he knew the precise misdemeanour by which it was in fact obtained. However, it is not sufficient merely to prove that the accused knew that the property fell into the wide category of property dishonestly obtained. On the other hand if the prisoner is charged with receiving property obtained by a misdemeanour but believed that the property was in fact stolen or obtained under circumstances amounting to a felony, he would be entitled to be acquitted.

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[13] (1823) 3 Dow. & Ry.K.B. 572.

It must be noted that section 43 (1) of the same Act concerns us here. The effect of that provision is that for the purposes of aiding the prosecution in ascribing to the accused the necessary guilty knowledge there may be given in evidence at any stage of the proceedings the fact that any other property stolen within the previous twelve months had been found on his premises or the fact that he had been convicted of any offence involving fraud or dishonesty in the previous five years. This evidence alone is obviously insufficient to bring home to the accused the necessary guilty intent.

This question was raised in *R.* v. *Schama*, *R.* v. *Abramovitch*.[14] The Court of Criminal Appeal decided that a person charged with being in possession of recently stolen property well knowing it to have been stolen, when the prosecution have proved recent possession of stolen goods, the jury should be directed that in the absence of any explanation which may reasonably be true they may find the accused guilty but are not bound to do so.

Lord Reading C.J., during his judgment said:

> "In a case where a charge is made against a person of being in possession of recently stolen property, well-knowing it to have been stolen, when the prosecution had proved that there had been recent possession of goods which had been stolen, the jury should then be told that they might, not that they must, in the absence of any explanation which might reasonably be true, find the prisoner guilty."

Thus the ambit of section 44 is not so wide as at first would appear to be the case.

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[14] (1915) 84 L.J.K.B. 396.

In *R.* v. *Garth* [15] Lord Goddard C.J. followed the dicta of Lord Reading C.J., in *Schama* and pointed out that if the prisoner should raise a doubt in the minds of the jury whether or not he knew that the property had been stolen, the ordinary rule was to apply that, the case not being proved to the satisfaction of the jury, the prisoner was entitled to be acquitted.

What is the exact nature of the *mens rea* required by section 33 (1)? The leading case on this subject and one which has given rise to much discussion is *R.* v. *Matthews*.[16] Here the appellant, accused under section 33, stated that he had received the property with the intention of handing it back to the police but did not in fact do so.

In the Court of Criminal Appeal Lord Goddard C.J. said:

> "If at the time when the property is received the receipt is innocent, the fact that the receiver changes his mind and later misappropriates the property does not turn the receipt into a felony, and that has been the law of this country for very many years."

This case prompts the question as to the exact nature of *mens rea* in this offence. If it is not sufficient for the accused to have known that the goods were stolen when he received them—what further mental state must exist at that time to make such a receipt criminal?

In *R.* v. *Havard* [17] Ridley J. said:

> "It is not sufficient to say that if a man is reckless and does not care he is just as guilty as if he received the property, knowing at the time that there was something wrong with it. . . .
>
> "The proper direction . . . is that the jury must take into consideration all the circumstances in which the goods were received, and must say if the appellant, at the time when he received the goods, knew that they had been stolen."

Professor Edwards has suggested that the same principle is embodied in *R.* v. *White*,[18] where it was held that belief without actual knowledge is sufficient to establish guilt, provided, of course, that the accused refuses to pay heed to that belief and proceeds to receive the stolen goods.

Intention to deprive rightful owner

Finally, it has been suggested that it is necessary to show that the person receiving stolen property must have the intention of depriving the owner of his rightful ownership. In the field of larceny this question has been discussed at some length in *Ruse* v. *Read*.[19] There the defendant, while under the influence of drink, borrowed or took a bicycle and proceeded to ride about on it. He then took it home and the justices found that he had no felonious intent at the time he took it away. But the following morning when he discovered that he had the bicycle he sent it off by rail adressed to himself at some Northern station. It was held that that amounted to stealing.

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[15] [1949] 1 All E.R. 773.

[16] (1950) 34 Cr.App.R. 55

[17] (1914) 11 Cr.App.R. 2.

[18] (1859) 1 F. & F. 665.

In *R.* v. *Riley*,[20] a man drove his sheep into a field and the next day discovered he had one sheep which did not belong to him. Taking the sheep out of the field was undoubtedly a technical trespass to goods. At the time he took it out he was innocent of a felonious intent, but it was nevertheless a trespass. When having wrongfully, though not feloniously, taken the sheep, he afterwards made up his mind to appropriate it, he became guilty of a felony.

It was never suggested in either *Riley* or *Ruse* v. *Read* that either defendants had become guilty of receiving. But in each there was a subsequent intention to "keep" the property, thereby incurring liability.

How far can this doctrine be said to apply to the field of receiving?

In *Matthews* it would appear that the conduct of the accused did not amount to larceny even if he intended to conceal the stolen goods *ad infinitum* when he first hid them. *Riley* and *Ruse* v. *Read* were expressly distinguished in *Matthews*. In each of them there was a trespass, according to the court, but this belief has been strongly challenged by Professor Edwards in *Current Legal Poblems*, 1950, who believes that there was no trespass in *Riley*. He suggests that the case of a man driving out a flock of lambs including one which was not his, while in ignorance of that fact, has not committed a trespass; and he compares it to the position of a shopper who possesses a packet which has fallen from a counter without his knowledge. It is suggested that this latter view, while not having strict relevance to this present discussion, is the more accurate.

In *Matthews*, Lord Goddard C.J. said:

> "If the jury had believed the appellant's evidence, that he had innocently taken the property in the sense that he intended to return it to the true owner or the police, there would be

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[19] [1949] 1 K.B. 377.

[20] (1853) Dears. 149.

> no trespass, and therefore he would not be guilty of the offence of stealing."

The accuracy of this conclusion cannot be doubted, yet, as Mr. Rupert Cross has pointed out,[21] it is a striking illustration of the inadequacy of the current definition of larceny with its out-moded insistence on the necessity of a trespass.

Mr. Sutterthwick's Court

By A. E. JONES, *Magistrates' Clerk*

Driving while Disqualified

"There is a right of trial on the third charge against Larnham, Mr. Frell," murmured Mr. Dotwell, anxious, as always, that nothing should have a chance to go wrong with a case in which he was the prosecuting solicitor.

"I've been aware of that since the Act was passed in 1930," the clerk murmured back, nettled at this seeming distrust of his professional competence. He turned to the young man who stood where the assistant gaoler had placed the number "1" on the dock front, and said, "The offence of driving a motor-vehicle on a road whilst disqualified for holding a driving licence carries a possible sentence of more than three months' imprisonment and so you have the right to be tried by a jury at the quarter sessions court on that charge. If you don't claim to be tried by a jury, the magistrate will deal with the case here. Which court do you wish to try you?"

"Can I appeal to sessions if the magistrate finds me guilty?" asked Frederick Larnham, after considering the matter for some moments.

"Yes—assuming you've pleaded not guilty," replied the clerk.

"Well, I might as well say 'here' then. It'll come to the same thing either way."

"Not quite," explained Frell. "On appeal you wouldn't be tried by a jury, but by a committee of magistrates."

"Oh," said the defendant. "That's different," and pondered again.

"Well, which is it to be?" inquired Mr. Sutterthwick, somewhat impatiently, as the pause lengthened.

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[21] (1950) 13 M.L.R. 523.

" I'll trust you to do justice to my case, sir," said Larnham winningly, making up his mind suddenly and then wondering whether he had said the right thing as the magistrate showed no sign of appreciating this vote of confidence.

" Do you plead guilty or not guilty? " asked the clerk.

" Not guilty," replied the defendant firmly.

" You are both charged with taking and driving away a motor-vehicle without the consent of the owner or any lawful authority," the clerk went on, addressing, in addition to Frederick Larnham, his co-defendant, Arthur Billington, in front of whom the number " 2 " was displayed. Both men pleaded not guilty to this charge, and also to a further charge of using the motor-vehicle on a road without the user being covered by a third party insurance policy.

Evidence for the prosecution

" It is not necessary, I think, to open this case in detail, sir," announced Mr. Dotwell. " Apart from formal evidence from the owner of the car, the witnesses are police officers, and the case for the prosecution will, I feel sure, emerge quite clearly from their account of what they saw and heard. I need only say this: the evidence of driving against Larnham is almost entirely circumstantial and a matter of inference—but nonetheless cogent on that account, in my respectful submission. There is one further matter I might just mention at this stage. The defendants are not legally represented, and it is not for me to anticipate their defence; but, from the evidence available to the prosecution, it would appear that Larnham may suggest that the driver of the car was a third young man who is not before you for the good reason that he escaped and has not been traced. Should that defence be made I would respectfully submit that, even if it were believed, it would not, in the special circumstances of this case, avail Larnham, and he would still be guilty of driving while disqualified. It would not be advisable, I feel, for me to say any more on this subject at the moment. I do not wish, unless I must, to introduce matters which might be thought to give rise to a prejudice against the prisoners. But, if the need occurs, I hope that you will give me leave, sir, to address you further in support of my submission and to call certain additional evidence which would be material to it."

" I must say that I find all this rather mystifying, Mr. Dotwell," said the magistrate. " However, let us proceed with the case and hope for the best."

The first witness was a rather flustered, middle-aged woman who testified that she had left her husband's car outside a friend's house in St. Luke's Rise at about 8.15 the previous evening, and had failed to find it there when she went to drive away just after 9.45 p.m. Although Mr. Dotwell tried to persuade her that the magistrate would not be interested, she insisted on informing the court that her husband had expected her to pick him up at the station that night, and he was very cross with her when he eventually found out what had happened.

"I don't see why he should blame you," said Mr. Sutterthwick, showing his customary reaction to any hint of ill behaviour to a lady.

"He said I shouldn't have left the car unlocked," explained the witness.

"Ah, that was a justifiable criticism," admitted the magistrate, "though it's a precaution that doesn't always prevent this sort of thing happening."

The lady concluded her evidence by giving the required negative to Mr. Dotwell's inquiry whether she had given anyone permission to drive the car away, but she clearly thought that the question reflected little credit on the prosecuting solicitor's intelligence.

Larnham was eager to cross-examine the witness and seemed very pleased when he obtained her admission that she had never seen him before. He next tried to get her agreement to the proposition that, if he had been in the "Teahouse Café" all the evening until after ten o'clock, he couldn't have taken her car. She seemed to feel, however, that this was asking her to make an admission against her own interests, and the defendant's persistence had not brought him the answer he wanted before Mr. Sutterthwick closed the discussion by invoking the laws of evidence. Billington had no questions to ask the witness.

She was succeeded in the witness box by a policeman; Mr. Dotwell honoured this status by saying, "You can give your evidence without prompting from me, I'm sure, constable." The officer's notebook enabled this prediction to be fulfilled. Refreshed at intervals by memory-stimulating draughts from this contemporary record, the witness related how, at 10.25 p.m. he was cycling along East Street when his attention was attracted by a stationary car which suddenly started up, went a few yards and then stopped. He next heard the self-starter operated unsuccessfully several times, and decided to make investigations. As he approached, he saw, through the car's rear window, that a man was climbing over the back of the driver's seat into the seat behind it. When he reached the vehicle he found Prisoner Number One in that seat, with Prisoner Number Two sitting beside him. In the front passenger's seat was a man who later gave his name as Terence Chowcross and his address as 45 Simmington Street. The constable asked who the car belonged to, and got no reply. His next question, " What are you doing in this car? " did, however, induce Larnham to speak. He said: " Sheltering from the rain." The officer took their names and addresses at this stage, and then announced that he had reason to believe that the car had been driven by Larnham. He asked Larnham whether the car belonged to him or whether he had permission to drive it; the answer was: " It ain't my car and you never saw me drive it." This brought from the constable the standard formula that he was not satisfied with the explanations given and was going to take all three men to the police station for further inquiries, as he suspected that the car had been stolen. At this point, Terence Chowcross opened the door on his side of the car and ran away.

The witness continued, " It was a two-door car. I got into the front of it and prevented the two defendants from leaving. I noticed that their clothing was quite dry, although it had been raining for about three-quarters of an hour. On the driver's seat there was part of a footprint, apparently made by the sole of a dusty shoe. I sent a passing civilian for assistance, and, upon the arrival of a police vehicle, the defendants were taken to the station. The car they were in had to be towed there as it had run out of petrol, although the gauge still indicated nearly a gallon."

" Mine does just the same," commented Mr. Sutterthwick.

" So does mine, sir, with respect," said Mr. Dotwell.

The officer appeared to be on the point of adding his own experience but recollected himself and continued, " The choke was fully out and that could have accounted for the car going the short distance I observed it in motion. At the police station I examined the shoes that Larnham was wearing. They were dry and dusty and had rubber soles with a bar pattern which corresponded with the footmark on the driver's seat of the car. The soles of Billington's shoes were damp and they were plain leather. As a result of what I learned at the station I told both prisoners that the vehicle in which they were found had been taken without authority from St. Luke's Rise between 8.15 and 9.45 that night. Before I could caution them Larnham interrupted and said: ' I was in the " Teahouse " all the evening till after ten.' I told them they would be charged with taking and driving away the vehicle without the consent of the owner or any lawful authority and also with using it on a road without being covered by a third party insurance policy. I cautioned them and Larnham said: ' All I know is that Terry let us shelter in the car because it was raining '; Billington said: ' I was just picked up. I didn't know it was pinched.'

They were subsequently formally charged and cautioned and neither made any reply. This morning I was present at the rear of the court when Larnham was further charged with driving the car whilst disqualified. After being cautioned, he said: 'I was in the back all the time. I wouldn't be so silly as to drive, knowing I was disqualified.' "

Mr. Dotwell, who had been standing with his face in his brief making sure that the witness's evidence included everything that was in his proof, now sat down, and the clerk asked Larnham whether he had any questions to put to the witness. "Yes; quite a lot," said the defendant, and started with, "First of all the copper never saw me drive the car."

"What do you say to that, officer?" asked Frell.

"I saw the car being driven and immediately after it stopped I saw Prisoner Number One climbing out of the driving seat into the back of the car," was the reply.

"No you never," said Larnham vehemently.

"You must take his answer," said the clerk. "What's the next question?"

"It was Terry Chowcross who was driving the bus. I was in the back all the time."

"It was your footprint that was on the driver's seat," remarked the officer.

"You can't prove that," protested the defendant excitedly. "Millions of people wear rubber soles like mine. They're only Woolworth's. You don't know that Terry wasn't wearing a pair too. I happen to know that he does use them. You never examined his shoes, did you?"

"I never saw him standing on the seat."

"But he might have done before you saw the car. You don't know. I don't know. He was in it before us. Did you examine the steering wheel for finger-prints?"

"No, I didn't."

"Why not? That would have proved I never drove the car."

"I didn't think it likely there would be any distinguishable individual prints as the owner of the car had been driving it as well as his wife and you."

"I never drove it. You ought to have had it photographed for finger-prints. That would have been real evidence and proved my innocence."

"That may be your view as an amateur criminologist," said Mr. Sutterthwick, "but the fact is that he didn't have it photographed, so I shall have to decide the case without that."

"It isn't fair," said Larnham, "there always ought to be finger-print evidence."

"Mr. Weller put his faith in alibis," remarked Mr. Sutterthwick, but, seeing the blank look of incomprehension on the defendant's face, added quickly, "Any other questions to the officer?"

"Yes. He said it had been raining for three-quarters of an hour. Well, I don't know where he'd been before he grabbed us, but it had only just come on to rain where I was. That's why my shoes weren't wet."

"What do you say to that, officer?" asked the magistrate.

"I'd been patrolling the near vicinity of East Street for about an hour, your worship, and, as far as I could see, the rain was general. The pavement and street by the car were very wet and the car itself was streaming with water."

"The rain came on very sudden—like a cloudburst," said Larnham, and demanded of the officer, "Have you got any evidence here from the Weather Bureau?"

"The calling of witnesses for the prosecution is a matter for me," remarked Mr. Dotwell with dignity.

"Oh," said the prisoner. "Sorry," and appeared too nonplussed by this intervention to badger the witness any further. Billington had no questions to ask the officer.

The sergeant, who was the next witness, readily agreed with the prosecuting solicitor's suggestion that he had been present in court three months previously when the accused Larnham, on conviction for using an uninsured motor-vehicle, had been disqualified for twelve months for holding a driving licence. Mr. Dotwell then turned to the magistrate and said, "I must at this point, sir, refer to what I said earlier about adducing evidence of a rather unusual character in a certain eventuality. I venture to think it is clear now, from Larnham's cross-examination, that it is his case that the third man, Terence Chowcross, was the driver of the car—and not he, Larnham. It is my submission that, even so, he would still be guilty of the offences charged. . . ."

"I can understand that you might ask me to infer that they were acting in concert and therefore equal participants in taking the car and using it without insurance cover," interrupted Mr. Sutterthwick, "but I can't see how you can expect me to find that Larnham was driving while disqualified, if I accept that Chowcross was, in fact, the driver."

"The prosecution can prove that Chowcross was also disqualified from driving, sir."

"How can you prove that when he isn't here to be identified?"

"The third man in this case gave exactly the same name and address as the disqualified person—though, of course, he has now left that address, or he would be in the dock here today."

"Someone else may have given Chowcross's name and address on this occasion."

"The physical descriptions of the two men tally exactly, sir."

"Still, even if you succeeded in this identification, how could you prove that Larnham knew of Chowcross's disqualification, Mr. Dotwell?"

"Because, sir, they were disqualified at the same time and place. The officer who is now in the box can go on to give evidence—if you will admit it—that Chowcross was charged jointly with Larnham on the occasion he has spoken of, and that Chowcross was then similarly disqualified for twelve months."

Mr. Dotwell could see that this revelation had taken the court by surprise and he paused to savour his forensic triumph while Mr. Sutterthwick tried to review quickly all the implications of the situation.

"Are you asking me to infer from the evidence that there was an agreement between the two men that Chowcross should drive while disqualified?" inquired the magistrate finally.

"I don't think I need go as far as that, sir. I submit that, if Larnham knew that Chowcross was disqualified and nevertheless allowed him to drive, he was, at least, guilty of aiding and abetting him and can therefore be charged as a principal in this purely summary offence. The authority I put forward for that is *Du Cros* v. *Lambourne* [1]—with which you are, no doubt, familiar sir."

"I'm supposed to be familiar with so many cases," said Mr. Sutterthwick. "Refresh my memory, please."

"Certainly, sir. *Du Cros* v. *Lambourne* was a dangerous driving case in which the evidence was conflicting as to whether the defendant or the young lady sitting by him in the front seat of the car was actually driving. The justices held that it was immaterial as he was clearly aiding and abetting her, even on the most favourable construction. They accordingly convicted him of dangerous driving, and it was held, on a case stated, that they were right in so doing. The High Court pointed out that, even if the young lady was driving, the defendant could and should have prevented her."

"But, if I remember rightly, he was the owner of the car and had allowed her to drive," interposed Frell.

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[1] [1907] 1 K.B. 40.

"That is so," said Mr. Dotwell. "But, in my respectful submission, the situation is not materially different here. True, neither man was the owner of this vehicle; but the evidence shows—in the view of the prosecution—that, acting in concert, they put themselves, albeit illegally, in the position of the owner, and each of them could and should have stopped the other driving."

"Well, it strikes me as a novel proposition; but you may be right, Mr. Dotwell," said the magistrate. "However, I shouldn't like to risk any injustice to the defendant and I would prefer you not to give this further evidence. Then there will just be the simple issue for me to decide: did Larnham drive or did he not?"

"As you please, sir. I have no wish to create difficulties for you—or to do anything which might be considered unfair to the accused. The prosecution do, in fact, feel confidence in the evidence adduced that Larnham was the driver. In the circumstances I have no further questions to ask the sergeant, and I close my case."

Evidence for the defence

"Do you wish to give evidence on oath?" said Mr. Sutterthwick to Prisoner Number One. There was a pause while the young man cogitated on this; then he announced with an air of honest simplicity, "No, I don't think it's necessary, your worship. I can tell the truth just as well from here."

"The decision is yours," said the magistrate. "What do you wish to say to me not on oath?"

"Well, sir, I'd been in the 'Teahouse' with Arthur here all the evening until gone ten o'clock. Then we were on our way home and all of a sudden it came on to rain very hard. Then this car pulled up beside us—I suppose he saw we were getting wet—and the chap in it asked if we'd like to get in. It was dark and I didn't see who it was at first. Arthur and me got in the back seat and then I saw it was Terry Chowcross driving. He told us he'd run out of petrol, so I thought there'd be no harm in me sitting in the back till the rain gave over, as he couldn't drive. I admit I knew he was disqualified because it was the same time as me; but I made up my mind to have nothing more to do with cars after that. And I swear I've never driven one since, honest to God, your worship."

"You've elected not to swear it," said Mr. Sutterthwick. "Is there anything else you wish to say?"

"No; only that I'm innocent."

"Have you any witness to call?"

"Terry would be my witness, if he was here. But how can I be expected to find him when the police can't?"

Billington unhesitatingly declined to go into the witness box; all he had to say in his defence was, "I say the same as him, sir. All what he's said is true. We only sat in the back of the car and never drove it."

Mr. Sutterthwick leaned over towards Frell and said in a low voice, "I suppose it's a good defence that you were only given a lift some time after the car had been taken, even though you knew then that it hadn't been obtained honestly?"

"Yes, I think you must be in at the original taking, to be guilty," replied the clerk. "The offence under section 28 (1) is not a continuing offence,[2] though it has recently been held that the circumstances in which a passenger is found in the car may set up a prima facie case that he was acting in concert with the other occupants."[3]

Verdict and sentence

The magistrate straightened up and said to the two accused, "I accept the constable's evidence. I don't see how he could be mistaken in the vital facts; they satisfy me that you, Larnham, were driving this car and are guilty of all three offences charged against you. With regard to you, Billington, I don't believe you when you support Larnham's story; but I am impressed by the officer's evidence that the soles of your shoes were wet, though Larnham's were dry. That suggests that you weren't with him all the time, and it is possible that you only became a passenger in the car some time after it had been taken. I am going to give you the benefit of the doubt and dismiss the case against you; but I should advise you strongly to regard this experience as a warning against the dangers of bad company. You can go. What is known about Larnham?"

Inspector Campting got up and, consulting a folder, said, "He is nineteen years of age, your worship, and a single man. Apart from the previous conviction given in evidence—which was also accompanied by convictions for taking and driving away and no driving licence—he has two findings of guilt as a juvenile, the first as a suspected person when he was put on probation for twelve months, and the second for housebreaking and larceny when he was sent to an approved school. He is employed as a fitter's mate, earning £8 10s. a week and is supposed to be living with his parents, but I understand from his father that he is often out all night and has, on occasion, been away from home for days at a time. His parents don't seem to have much influence over him, your worship."

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[2] *R.* v. *Stally* [1959] 3 All E.R. 814.

[3] *Ross* v. *Rivenall* [1959] 1 W.L.R. 713.

Mr. Sutterthwick's inquiry whether Larnham disagreed with any of this brought a disinterested shake of the head; having lost his fight to escape conviction, the accused appeared to be prepared to accept sentence with fatalistic resignation.

The magistrate turned to the probation officer with, "Can you tell me anything about him, Mr. Thorburton?"

"I've known him since he was licensed from the approved school, sir," replied Thorburton. "His parents have frequently been worried about him, and have consulted me about him, voluntarily, from time to time. His work record isn't a bad one—though he only gives his mother thirty shillings a week out of his earnings. As you can see, sir, he's developed this craze for driving cars—and he hasn't the means to do so honestly. If he could get some proper leisure activities or interests instead of hanging about low-class cafés and getting into bad company, there's no reason why he shouldn't be a decent citizen. The home's quite a respectable one, sir, but I'm afraid it's always been rather lacking in discipline."

Larnham accepted the probation officer's report with the same indifference he had shown to the police one.

Mr. Sutterthwick spoke quietly again to the clerk. "This driving while disqualified offence is the one where the Act says I'm to imprison unless there are special reasons to the contrary, but yet I mustn't imprison anyone under twenty-one unless there's no other appropriate way of dealing with him. Does that prevent me from imposing imprisonment in this case?"

"No, sir," replied Frell, "The High Court has laid it down that, provided you take account of the provisions of the Criminal Justice Act, you can give effect to the requirement of the Road Traffic Act.[4] You may wish to know that there will be no vacancy in the detention centre for some time yet."

"Frederick Larnham," said the magistrate, "in view of your past record and the gravity of the offence, I feel bound to send you to prison on the charge against you of driving while disqualified. The least sentence I can impose, in all the circumstances, is one of three months. There will be a concurrent sentence of three months for taking the car without authority, and a further concurrent sentence of one month for using it while uninsured. On each of those charges there will be a concurrent disqualification of five years for holding a driving licence and I make a formal order of indorsement. If you don't pull yourself together and make up your mind to behave in future, I'm afraid you'll very soon find yourself in Borstal."

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[4] *Davidson-Houston* v. *Lanning* [1955] 1 W.L.R. 858.

As the prisoner was led away, Mr. Sutterthwick turned to Inspector Campting and said, "I should like to commend the arresting officer for his alertness and powers of intelligent observation."

"Thank you, your worship. Your remarks will be conveyed to the Chief Constable," said the inspector, reflecting ruefully that when the police were complimented he had just as lengthy a report to draw up as if they had been censured.

Committal on Inquisition

By J. D. J. HAVARD, M.A., LL.B., M.B., *Barrister-at-Law*

History of the procedure

The procedure of committal on a coroner's inquisition antedates by at least a century the more usual procedure of indictment on a preliminary investigation by justices of the peace. At the end of the twelfth century homicide was prosecuted either by private appeal or by presentment on a coroner's inquest. Hence of 114 cases appearing at the Lincolnshire eyre of 1202, 73 were presented on coroners' inquests, and 41 were prosecuted by private appeal.[1]

For various reasons, which need not concern the reader in detail, prosecution by private appeal fell off considerably during the thirteenth century. Abolition of the various ordeals by fire, water, etc., following the Lateran Council of 1215 left battle as the only method of deciding an appeal, a course which has certain disadvantages; the Royal Justices began to discourage appeals by insisting upon strict uniformity between the appeal, as brought in the county court, and as brought before themselves, fastening upon any irregularity or inconsistency to invalidate the whole proceedings, and inflicting heavy fines on all who failed to prosecute their appeals. Magna Carta[2] made the writ *de odio et atia*—the medieval precursor of the action for malicious prosecution available to anyone who should apply for it, thereby making it possible for the person appealed to avoid battle by averring that the appeal had been brought maliciously: the appearance of certain new writs, notably trespass, offered a far more favourable method of prosecution, and carried the additional advantage of providing damages.[3] In contrast, prosecution by private appeal held out little more than the prospect of personal vengeance in battle, with the additional hazards of personal injury and heavy fines. By the end of the thirteenth century the usual method of prosecuting homicide was on a coroner's inquisition.

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[1] 22 Lincs.Rec.Soc. 524 *et seq.* and see the analysis by I. L. Langbein (1933) 33 Col.L.R. 1337, n. 24.

[2] c. 36.

During the next century the justice of the peace, an office which had been recently instituted, rapidly amassed an extensive jurisdiction which included the preliminary investigation of persons suspected of homicide.[4] Coroners were expected to attend their sessions in order to deal with exigents and outlawries, but although the justices were allowed, after 1461, to act on a sheriff's indictment, they were never allowed to act on a coroner's inquisition.[5]

By 1300 most counties had experienced their last Eyre, but coroners continued to commit cases to justices holding less impressive commissions, such as gaol delivery. In 1508[6] justices of the peace were authorised to inquire into and determine defaults of coroners, although there is evidence that they had been doing so since the fourteenth century.[7] In 1554 the form of proceedings for preliminary examination before the justices of the peace was placed on a firmer footing by a statute which provided that the justices must put into writing "as much thereof as shall be material to prove the felony."[8] The same statute required the coroner at his inquest "to put into writing the effect of the evidence given before him being material." It followed that before the J.P.s only the evidence for the Crown would be given, whereas before the coroner all the material facts would be recorded including those in favour of the prisoner. The result was that the higher courts attached greater authority to a coroner's inquisition than to a committal by justices of the peace. Hence, in *Vicars* v. *King*, Fleming C.J. is reported to have said that "when a coroner's inquisition finds a fact to be only manslaughter and the same fact at the sessions is found to be murder, that in this case the verdict before the coroner is rather to be credited because the coroner examines the evidence on both sides, but on indictment at the sessions they examine only the witnesses for the king."[9] As late as 1823 Parke J. (as he then was) directed a grand jury that a justice of the peace acts inquisitorially, that proceedings ought to be held in secret, and that the information obtained might be communicated to the prosecutor but not to the party accused.[10] Finally, a statute was passed in 1826 affecting the proceedings before both justices and coroners, which provided that evidence favourable to the accused might be given in front of the justices of the peace.[11] It had been the practice of the J.P.s for some time to hold a preliminary examination into cases of suspected homicide notwithstanding the fact that it was known that the person charged had already been committed on a coroner's inquisition. The bad relations subsisting between coroners and justices at that time precluded any mutual solution of this unfortunate state of affairs and in many cases the justices discharged persons who had been committed on inquisition by the coroners. At least one coroner, Thomas Wakley of Middlesex, countered this practice by committing persons his jury had found guilty of homicide straight to Newgate gaol, for which he was severely censured by the justices.[12]

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[3] See Introduction to *Select Cases of Procedure without Writ under Henry III*, 60 Selden Soc. (ed. H. G. Richardson, G. O. Sayles) (1941).

[4] Fitzherbert's view that they could not do so is now generally discredited. Coram Rege rolls, ancient indictments, gaol delivery rolls are literally full of indictments of murder brought before justices of the peace, and Fitzherbert himself cites two cases without noticing the contradiction. B. H. Putnam, *Early Treatises on the Practice of the Justices of the Peace in the 15th and 16th Centuries* (1924), 198 *et seq.*

[5] W. Lambard (1610) *Eirenarcha* iv, c. 3; B. H. Putnam, *Proceedings Before the Justices of the Peace in the 14th and 15th Centuries* (1938), iv *et seq.*

[6] 1 Hen. 8, c. 7.

[7] B. H. Putnam (1938), *op. cit.*, 82.

[8] 1 & 2 Phil. & Mary, c. 13, s. 5.

The nineteenth century

The marked improvement in proceedings of preliminary examination before the justices which occurred in the mid-nineteenth century was not accompanied by a similar improvement in proceedings before the coroners. Consequently, the procedure of committal on inquisition fell into some disfavour. The Royal Commissioners on the Criminal Law received evidence that "it is seldom that the coroner's inquisition is good on the face of it . . . they are never relied on, a bill of indictment being always presented, notwithstanding the return of a coroner's inquisition."[13]

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[9] (1609) cited Umfreville (1761) *Lex Coronatoria* 168.

[10] J. F. Stephen, *History of the Criminal Law of England* (1883), i, 227.

[11] 7 Geo. 4, c. 64, ss. 2, 3 (affecting justices of the peace), and 4 (affecting coroners). This was later repealed in so far as it affected proceedings before the J.P.s by 11 & 12 Vict. c. 42 (Sir John Jervis's Act). For a valuable comparison between the last-named Act and the Act of Philip and Mary, see J. F. Stephen (1883), *op. cit.*, i, 221 *et seq.*

[12] *Coroners* (*Middlesex*), Sel.Cttee.Rep.; 1840 (549) xiv, 339, at pp. 86–87.

[13] 5th Rep.; 1849 (1100) xxi, 477 Draft Bill, c. 1, Art. 29.

In fact it was possible, and often happened, that a person could be tried on either the justices' indictment, the coroner's inquisition or both, but as appears from the Commissioners' report it was becoming increasingly common not to rely on the coroner's committal. Consequently, the Commissioners recommended that the procedure of committal on a coroner's inquisition should be abolished.[14] This recommendation was met with a storm of protest in the press, because the public set great importance on the independence of the coroner's inquest, and the power of the jury, who, after all, represented the man in the street, to commit to trial for homicide.[15] The justices, it will be remembered, were anything but independent. They were both appointed and removable by the Crown. When Sir Robert Baker, the Bow Street magistrate, had refused superior orders to divert Queen Caroline's funeral procession, thereby saving considerable bloodshed, he was summarily dismissed, though nobody could deny that his action was completely in accord with the security of the public.[16] On the other hand, nothing could stop Thomas Wakley from pursuing his investigations into the death of a trooper of the Royal Horse Guards who had been flogged to death at Hounslow Barracks.[17] If it had not been for the independence of the coroner the brutalities of army punishment might have remained unchecked for much longer. Deaths in workhouses, prisons and other institutions were occasionally the subject of a committal for trial by the coroners whose duties included the holding of inquests in such cases. The public knew full well that there would be little chance of the true state of affairs coming to light if the institution of criminal proceedings was left to the justices, who were guardians of the poor, in control of the police, and generally managed the local administration. In short any facts reflecting on the local administration might well be concealed by a refusal to commit. Undoubtedly public opinion played a large part in preventing the commissioners' recommendation from becoming law. It was not uncommon for coroners' juries to become public heroes as a result of their findings in cases where the administration was to blame. At the conclusion of the inquest on the death of a policeman who had been killed in attempting to disperse a public meeting during the turbulent 1830s, the coroner's jury stated: "We find a verdict of justifiable homicide on these grounds; that no Riot Act was read nor any proclamation advising the people to disperse; that the Government did not take the proper precaution to prevent the meeting from assembling; and that the conduct of the police was ferocious, brutal and unprovoked by the people; and we moreover express the hope that the Government will, in future, take better precautions to prevent the recurrence of such disgraceful transactions in the metropolis."[18] The verdict was followed by public meetings all over England. Ten thousand people assembled at Newcastle to pass a resolution in support of the coroner's jury. The coroner eventually agreed to accept the verdict of justifiable homicide and struck his pen through the rest of the verdict, which was, in effect, a rider. This did not prevent it receiving the fullest publicity, and the jury, as national heroes, were feasted (several M.P.s being present) and awarded with silver cups and medals, the latter being inscribed "in honour of men who nobly withstood the dictation of a coroner, and by the judicious, independent, and conscientious discharge of their duty, promoted and continued reliance upon the laws, under the protection of a British jury." This sort of thing was, of course, capable of being taken too far, as happened in several Irish cases during the political disturbances. Arthur Balfour, when chief secretary for Ireland, had a verdict of wilful murder returned against him by an Irish coroner's jury at the inquest on John Manderville, who had died while in prison. Balfour applied to the Queen's Bench and obtained a writ of certiorari to quash the record of the proceedings, but John Morley, another chief secretary, who had the same verdict returned against him for failing to reprieve the execution of John Twiss, did not bother to obtain a writ with the result that the verdict of wilful murder remains recorded against him.[19]

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[14] *Ibid.*, at p. 1. So long as an indictment was capable of being thrown out by the grand jury there remained an additional reason in favour of the procedure of committal on inquisition. In the words of one witness before the earlier Commissioners: "The coroner's jury have had evidence before them on oath, and which evidence is forwarded to the judge, who, if it turns out insufficient, or is not fully borne out at assizes, can always direct a common jury to deal with the case: but the grand jury have only *viva voce* evidence given before them in secret, so that a great safeguard of publicity is removed, and a witness desirous of screening a prisoner may vary his testimony as he pleases without fear of indictment for perjury." But the later Commissioners were apparently not impressed by this possibility: 8th Rep.; 1845 (656) xiv, 161 Mins. of Ev. 475.

[15] See *The Times*, August 2, 1849, and following days, also *Morning Advertiser*, August 4, 1849. The Press was not, however, unanimous, *e.g.*, see *Daily News*, December 15, 1849, which recommended the abolition of coroners and substitution by stipendiary magistrates.

[16] W. Baker, *Law of Coroners* (1851), p. 26.

[17] *Loc. cit.*

The transference of the local administration from the quarter sessions to the newly constituted local authorities at the end of the last century[20] purged the justices of much of the self interest in proceedings which might have been held against them, and this factor is no longer a valid argument in favour of the continuance of the coroner's power of committal. At the same time it is interesting to note that as late as 1928 an edition of *Jervis on Coroners*[21] suggested that " political motives " might possibly cause the justices to refuse to commit and that such an event would be " sufficient cause " for the coroner to resume his adjourned inquest under the Coroners (Amendment) Act of 1926. Corporations can, of course, now be indicted for manslaughter,[22] and it is conceivable that a coroner might find himself in a position where his jury return a verdict against his local authority. It is not unknown for friction to arise between local authorities and coroners over criticism of the local administration. Hence, in 1911 a coroner who had dealt severely with the conduct of his municipal corporation during an inquest was later invited to appear before a committee set up by the corporation to ascertain the right of the corporation to admonish or discharge the coroner.[23] A number of attempts have been made by local authorities to gain control over coroners. Hence, the Manchester Corporation Bill of 1890 contained a clause that the coroner should hold office during the pleasure of the council.[24]

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[18] See the reports of this inquest in *The Times*, May 16–21, 1833, cited Thomas F. Darnford, *Jervis on Coroners* (7th ed., 1927), 249–251.

[19] These two Irish cases are mentioned by Serjeant Sullivan in his memoirs, *The Last Serjeant* (London, 1952), 91–92.

Throughout the remainder of the nineteenth century there were intermittent criticisms of the procedure of committal on inquisition. The Criminal Law Procedure Bill of 1894[25] provided that coroners must indorse their committals with an order that the person charged should be taken before the justices, but it never became law.[26] Some judges such a Blackburn, Crompton and Lush JJ.[27] openly criticised the continuation of the procedure, while others, such as Lord Herschell, suggested that if coroners could be established with the powers and qualifications of stipendiary magistrates they could once and for all commit the accused for trial, thereby saving much unnecessary duplication.[28] A reform along these lines had been recommended by a Select Committee on Coroners[29] whose report was ordered to be printed on July 10, 1879. It is characteristic of the divided opinion on the question that in the previous month the Royal Commissioners had signed their report on Stephen's draft criminal code which provided that the verdict of a coroner's jury should no longer have the effect of an indictment, and should operate merely to bring the case before the examining magistrates.[30] Their report was too late for the code to be considered in the 1879 session, and when introduced in 1880 a change of Ministry put an end to its chances.

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[20] Local Government Act, 1888 (51 & 52 Vict. c. 41, s. 3).

[21] 7th ed., p. 141.

[22] Since the Criminal Justice Act, 1948, s. 13 (1), renders manslaughter punishable by a fine it follows that a corporation can be convicted of manslaughter if the mind of the agent can be properly attributed to it.

[23] 5 *Coroners' Soc.Rep.* (1908–13), 304.

[24] s. 22 (3), cited 2, *ibid.*, (1890–98), 42.

[25] Cited 2, *ibid.*, 110.

[26] It being pointed out that the coroner's inquest was a superior court of record to the Justices of the Peace.

[27] See *R.* v. *Ingham*, 4 New Rep. 141, and *Coroners' Soc.Rep.* (1860).

[28] See 2 *Coroners' Soc.Rep.* (1890–98), 105.

[29] *Coroners' Sel.Cttee.Rep.*; 1878–79 (279) ix, 433 at p. iv.

The Departmental Committee Report

Finally, in 1926, the first move was made to improve the situation. The Coroners (Amendment) Act of that year provided that if the coroner is informed before his jury has reached a verdict that some person has been charged with the murder, manslaughter, or infanticide of the deceased before the examining justices, he must, in the absence of reason to the contrary, adjourn the inquest until after the conclusion of the criminal proceedings. If there is "sufficient cause" he may resume his inquest subsequently but his jury cannot charge that person with any offence for which he could have been found guilty on the indictment, nor return a verdict inconsistent with the findings of the court on the indictment.[31] Hence, it will be open to the coroner to resume his inquest and for his jury to find a verdict of homicide if the examining justices have thrown the case out, or indicted for a lesser offence. Under these circumstances the accused person cannot subsequently plead *autrefois acquit* on the coroner's inquisition.[32]

The reason for this provision was, in the words of Sir Archibald Bodkin's memorandum to the report of the departmental committee on coroners in 1936, "to provide against the unnecessary expense and great inconvenience to witnesses and others involved in dual inquiries proceeding perhaps contemporaneously before the examining justices and Coroner."[33] Sir Archibald emphasised that there was no ground for assuming, as did the majority of the Committee, that the provision amounted to recognition that the coroner's inquest no longer played an important place in the administration of the criminal law. Unfortunately the Committee could not see the wood for the trees, and was so pre-occupied with the admittedly irregular proceedings before individual coroners, that it failed to see the value of the procedure of committal on inquisition in principle and recommended its abolition.[34] In the words of Mr. Rutley Mowll's Minority report: " . . . the report not only dwells unduly upon certain cases, either of exceptional difficulty or of extreme rarity, but also fails to recognise fully the immense value of the coroner's inquiry."[35] The general lack of confidence of the Committee in coroners is shown by its remarkable observation that: " . . . if a coroner in the course of his investigation has to cross-examine a suspect, it is, humanly speaking, almost impossible for him to preserve an impartial frame of mind towards the suspect."[35a]

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[30] Draft Criminal Code, R.Comm.Rep.; 1878–79 (117) ii, 175, 0506 (n. 192), ordered to be printed May 5, 1879. Art. 439 (n. 158).

[31] 16 & 17 Geo. 5, c. 59, s. 20 (1), extended by the Road Traffic Act, 1956 (4 & 5 Eliz. 2, c. 67), s. 8 (3), to include the offence of causing death by reckless or dangerous driving of motor-vehicles.

[32] In a case decided in 1944 a woman who had been committed for manslaughter on a coroner's inquisition, was subsequently charged with cruelty to children under the Children and Young Persons Act, 1933, s. 1, not being committed for manslaughter by the justices. Her plea of *autrefois acquit* was refused by the court as the proceedings before the justices had not been a trial (12 *Coroners' Soc.Rep.* (1943–48), 66).

[33] *Coroners*, Dept.Cttee.Rep.; 1936 (Cmd. 5070) viii, 1 at p. 69.

Amongst the features to which the Committee paid little or no attention was the value of the procedure as an incentive to the police to pursue a charge of homicide wherever the facts show a prima facie case, instead of charging a lesser offence in the hope of obtaining an easier conviction. Experience has shown that the police are often reluctant to bring charges of homicide in cases where a conviction can more easily be obtained for lesser offences such as cruelty to children, abortion, concealment of birth, etc. In this respect it is as well to draw a distinction between those cases where the police prefer to charge the lesser offence instead of securing a conviction based on constructive homicide, and those cases where the available material evidence is thought to be not quite sufficient to secure a conviction. In the former case the police, or their advisers, may be justified, at any rate on moral grounds, in not wishing to obtain a conviction based on what Dr. Glanville Williams has called the "emotionally confusing and logically irrelevant fact of death"[36] a death which may be in a sense quite accidental. In the second case, where the requisite *mens rea* is present, there can be no justification, apart from the spurious one of improving the countenance of the police returns of convictions. The possibility of the coroner resuming his inquest and committing for homicide in these cases acts as a very real incentive to the police to pursue the major charge at first instance. We shall notice some examples of this shortly. Also overlooked by the Committee was the value of the coroner's inquest as a forum particularly suited to the difficult medico-legal problems which often accompany cases of homicide. Finally, there is the coroner's power of compelling disclosure from an unwilling witness, which Sir Archibald Bodkin singled out for mention in his memorandum to the report,[37] emphasising that there is no other method in the country of compelling such disclosure. This is, of course, a vexed point. In giving evidence before the Committee the representatives of the county and borough chief constables actually disclaimed any desire to use inquests as a means of extracting incriminating evidence from suspected persons.[38] By the Coroners Act, 1887, s. 4 (1), the coroner is required to examine on oath all persons having knowledge of the facts whom he thinks it expedient to examine,[39] and by section 19 (2) of the same Act, any person duly summoned to give evidence at an inquest who does not without lawful excuse answer a question put to him, may be fined £5.[40] Although the Coroners Rules of 1953,[41] r. 18, require the coroner to inform the witness that he need not answer questions which may incriminate him, it is clear that refusal to answer may well be taken by the coroner's jury as an admission of guilt. Where a person is charged before the examining magistrates he need not, of course, be sworn unless he elects to give evidence, and there is, therefore, far less likelihood of his deciding not to give evidence being regarded as substantiation of the case against him, and of his being committed for trial on insufficient evidence.[42] However, the committee preferred, instead, to attach weight to cases of irregularities before individual coroners, and to statistical evidence such as the small number of committals which were recorded as having originated from coroners' courts.[43]

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[34] *Ibid.*, paras. 94, 95.

[35] *Ibid.*, p. 72.

[35a] Para. 101.

[36] [1957] Crim.L.R. 296.

The present day

Fortunately the power of committal on inquisition survived this onslaught and the only major modification it has suffered since has been the requirement that the coroner must adjourn his inquest for fourteen days if advised by the Chief Officer of Police that a person may be charged with murder, manslaughter or infanticide.[44] Although public opinion, judging by contemporary newspaper reports, has now swung round the complete circle to regard the procedure of committal on inquisition as placing the individual in danger,[45] there are signs that the judiciary recognise its value in terms of the factors enumerated above. In 1952 Devlin J. had occasion to make some remarks concerning the case of a man who had been charged by the police with dangerous driving, summarily convicted before the justices and sentenced to a fine of £7 and endorsement of his driving licence, only to be committed on inquisition for manslaughter when the coroner resumed his inquest. The learned judge, who stated that what he was going to say had the approval of the Lord Chief Justice, remarked[46]: ". . . the police should not prefer any lesser charge, or if for some reason such a charge is preferred, it should not be heard and determined until after the inquest is concluded. . . . It is disturbing to find that the police have been content to prefer a charge of dangerous driving in a case in which the coroner's jury arrived at a verdict of manslaughter. . . . The police can never be criticised if the (trial) jury thinks it right to reduce the charge, nor even if the judge thinks it proper to withdraw it from the jury, but they can be criticised if they usurp the functions of the proper tribunal by determining in advance what ought to be the triable issue."[47] Later the learned judge's remarks were included in a Home Office Circular sent to all police forces. The following year a particularly good example of the point in question occurred at Sheffield.[48] The coroner had been asked by the police to adjourn his inquest on the body of a new-born infant which had been found in a sack, as charges of homicide were contemplated in connection with its death against a man and the woman. The coroner adjourned his inquest and the couple were charged before the justices and committed for concealment of birth. After repeated requests for renewals of the adjournment,[49] during which time the couple became married, the Director of Public Prosecutions intimated that he did not intend to pursue the charge of homicide. The coroner thereupon resumed his inquest and the jury returned verdicts of murder against the man and infanticide against the woman. Medico-legal autopsy had shown that the child was born alive and had died from fracture of the skull and laceration of the brain received after birth. The pathologist reported that the usual excuse of precipitate delivery of the child into a bucket could not explain injuries of this nature, more particularly as the bucket was only 7½ inches deep. Accordingly, the couple were committed for trial at Leeds Assizes where the jury found both guilty of murder on the coroner's inquisition. Both the prisoners appealed unsuccessfully to the Court of Criminal Appeal. Certainly cases like this are uncommon but the mere fact that they can occur is justification enough for the continuation of the procedure of committal on the coroner's inquisition.

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[37] At p. 69.

[38] Para. 103.

[39] 50 & 51 Vict. c. 71, as amended by Coroners (Amendment) Act, 1926, s. 31, and 3rd Sched.

[40] *Ibid.*, as amended by s. 30 of the 1926 Act and its 2nd Sched.

[41] S.I. No. 205.

[42] On the right not to be questioned under oath, see Glanville Williams, *Proof of Guilt* (1955), 46 *et seq.*

[43] Paras. 86 and 102.

[44] Coroners Rules, 1953 (S.I. No. 205), r. 22 (1).

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[45] The legal literature contains little on the power of committal on inquisition, but what little there is in the journals is uniformly adverse. See (1938) 102 *J.P. Newspaper* 505; (1939) 3 J.Crim.L. 304, and (1940) 4 *ibid.*, 175; [1955] Crim.L.R. 595.

[46] *Re Beresford* (1952) 36 Cr.App.R. 1.

[47] It seems that if the coroner's jury have reached their verdict contrary to the direction of the coroner, and the justices have refused to commit, the trial judge will usually direct the jury to return a formal verdict of "Not Guilty." See [1955] Crim.L.R. 595.

[48] *R.* v. *Conroy* (1953) Leeds Assizes. I am indebted to Mr. A. P. Lockwood, H.M. Coroner for the City of Sheffield, for allowing me to see the depositions in this case, and permitting the facts to be given in this article.

[49] The Coroners Rules, 1953, r. 22 (2), provide that at any time before the date fixed for holding the adjourned inquest, the chief officer of police may ask the coroner for a further adjournment, and the coroner may comply with his request. In this case the inquest was first adjourned on July 8, further adjournments (without re-opening) being granted by the coroner on July 22, August 26 and September 23. On October 6 the inquest was resumed and the evidence stated above given.

Meanwhile there continue unfortunate, if isolated, incidents where the proceedings before the coroner resulting in committal appear to give an impression of unfairness. The law of homicide is one of the most complex departments of the criminal law, and it must be frankly admitted that adequate direction of the jury in the finer points of the *mens rea* is beyond the purview of a coroner who occupies his position in his spare-time from his normal profession of solicitor, doctor, or, least common of all, barrister. If irregularities occur [50] then it is the fault of the archaic establishment of coroners' jurisdictions and not of the procedure of committal on inquisition itself. In fact, the only exception of major importance in the procedure is the relative freedom from the laws of evidence which is enjoyed by the coroner. No person is " charged with an offence " at a coroner's inquest until after the jury has reached its verdict, and the Criminal Evidence Act does not therefore apply to proceedings during the inquest. Every person is a competent witness before the coroner whether or not charged by the police or suspected of having caused the death.[51] In fact, it has always been the usual practice of coroners, now incorporated in the Coroners Rules, 1953,[52] to protect witnesses against incriminating questions, and to notify them of inquests in which their conduct is likely to be called into question. However, it is easy to see that a very high standard of judicial ability is necessary if justice is to be done, and to be seen to be done, in an investigation conducted under relative freedom from the rules of evidence. The accusing finger must be pointed at the establishment of coroners' jurisdictions, which is responsible for any shortcomings under the existing system. It is not unreasonable to suppose that replacement of the present establishment which is still based largely on the medieval pattern, by a few large jurisdictions under highly qualified and experienced medico-legal officers would lead to the disappearance of most of the criticism of the procedure of committal on inquisition.

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[50] Most of these cases seem to arise in connection with driving offences. Consequently, it is likely that the new legislation in the Road Traffic Act, 1956, will lead to a reduction in their number.

[51] See Lord Russell of Killowen L.C.J. in (1898) 3 *Coroners' Soc.Rep.* (1899–1903), 20. See, also, Wills J. in *R.* v. *Davies* (1890) (" The Crewe Murder Case "), Chester Assizes, *The Times*, March 18, 1890 (reprinted in *Jervis on Coroners* (9th ed., 1957), 508–510.

[52] Rr. 18–20.

Practice and Procedure

Poor Prisoners' Defence Act, 1930

It is announced [1] that in future the Law Society will arrange for solicitors to undertake the defence of poor prisoners standing trial at the Central Criminal Court in all cases where defence certificates are granted and not only in cases where such certificates are granted on the opening day of sessions or between that day and the start of the trial of the accused.

The procedure will be as follows. On the Friday immediately preceding the opening day of each sessions, a number of solicitors equivalent to the number of defence certificates granted or likely to be granted at the opening of the sessions, will be asked by the Law Society to attend at the Central Criminal Court on the opening day of sessions to obtain the defence certificates and any depositions or other documents, and to have preliminary discussions with the accused. The Clerk of the Court hopes that it will then be possible for the solicitors undertaking the defence to give some indication of the time required to prepare for trial and the extent of any adjournment necessary.

The initial arrangements will be made by telephone between the Law Society and the solicitors concerned. The Law Society will confirm these by letter to arrive on or before the day preceding the opening day of sessions. The solicitors' names and addresses will be forwarded to the Clerk of the Court, who is responsible for allocating the particular cases to the solicitors appointed. The Law Society will maintain a record of the solicitors appointed, the cases allocated, and the sessions in which the defence certificates are issued.

These arrangements are not, however, inflexible and may be varied in particular cases or in the light of experience in working the scheme.

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[1] 56 *Law Society's Gazette* 765.

Case and Comment *

EVIDENCE

Admissibility—evidence of conversation between accomplices

R. v. Willis

Court of Criminal Appeal: Lord Parker C.J., Hilbery and Salmon JJ.: November 23, 1959: *The Times*, November 24, 1959.[1]

W. was convicted at quarter sessions of the larceny of a drum of cable. W. was the owner of a scrap metal business in which he employed one N. as foreman. Whilst properly collecting scrap metal from certain premises, N. instructed one of the drivers employed by W. to load a drum of cable which was not part of the scrap. N. admitted stealing the cable and the question was whether W. was acting in concert with N. The prosecution's case was that W. must have been so acting having regard to the circumstances (and particularly to the fact that the cable was disposed of to an old customer of W.'s) and they relied also on W.'s failure to give candid answers to the police. Two days after the stealing W. had seen N. in custody and, when W. sought to give evidence of this at the trial, the deputy chairman ruled that evidence of any conversation between W. and N. was inadmissible. On appeal to the Court of Criminal Appeal:

Held, dismissing the appeal, that the evidence of the conversation had been wrongly excluded. In *Subramaniam* v. *Public Prosecutor* [1956] 1 W.L.R. 965, it had been held that, on a charge of possessing ammunition contrary to regulations, evidence of what had been said to the defendant by terrorists was admissible on the ground that such evidence was relevant to the defendant's state of mind. Evidence of what was said to the defendant by someone who was not called as a witness was good evidence of the defendant's state of mind and, provided that the defendant's state of mind was relevant, was admissible at whatever point of time the statement was made. In the present case the defendant's state of mind was relevant on the question of his lack of candour to the police but the evidence was so overwhelming that, even if the evidence as to the conversation had been admitted, any jury properly directed would have been bound to return the same verdict. Accordingly, this court would apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, and the appeal would be dismissed. [H. P.]

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* Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For the appellant: *Edward Clarke* (instructed by Messrs. Nelson, Mitchell & Williams, Southend). For the Crown: *Kenneth Jones* (instructed by the Solicitor to Berkshire County Council).

Commentary. Whether a statement is hearsay or not depends on the purpose for which it is tendered in evidence. If the statement is offered to prove the truth of some fact asserted in it, then it is hearsay and inadmissible unless it comes within one of the exceptions of the hearsay rule. " Whether it is hearsay or not depends, as a rule, upon whether the *making* of the statement or its *truth* is in issue ": Harris, *Criminal Law* (19th ed.), 492. What is said to a man may affect his state of mind whether it is true or not. Such a statement is not offered as proof of the facts asserted in it, but as evidence of the belief of the person addressed. So in *Subramaniam*, where the defence was duress, the question was not whether the statements alleged to have been made to the accused by the terrorists were true, but only whether they were made and believed by the accused. The question in that case was as to the accused's state of mind at the time of the alleged offence; in the present case, the relevant time was when the accused was questioned by the police after the alleged offence; but there is no difference in principle.

EXPLOSIVES

Illegal possession—knowledge an essential element of the offence

R. v. Stewart and Harris

Court of Criminal Appeal: Lord Parker C.J., Cassels and Diplock JJ.: November 9, 1959: *The Times*, November 10, 1959.[2]

S. and H. were convicted at quarter sessions of possessing explosives contrary to section 4 (1) of the Explosive Substances Act, 1883. A four-ounce slab of gelignite and four detonators had been found in a car which S. was driving with H. beside him. Two other men were in the back of the car. The gelignite and detonators were on a shelf in the back of the car in a fruiterer's bag. There was also an electric drill. S. and H. had denied throughout that they knew there were any explosives in the car, and this was supported by the evidence of the other two men, who admitted possession of the bag and knowledge that it contained explosive substances.

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[2] For the appellant Stewart: *C. G. L. Du Cann* (instructed by Messrs. Lincoln & Lincoln). For the appellant Harris; *J. N. Dunlop* (instructed by Messrs. Lincoln & Lincoln). For the Crown: *William Howard* (instructed by the Director of Public Prosecutions).

Section 4 (1) of the Act of 1883 provides: " Any person who . . . knowingly has in his possession . . . any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he . . . does not have it in his possession . . . for a lawful object, shall, unless he can show that he . . . had it in his possession . . . for a lawful object, be guilty of felony, . . ."

S. and H. appealed to the Court of Criminal Appeal on the main ground that the jury had not been directed on the question of the appellants' knowledge.

Held, allowing the appeal, that as had been laid down in *R.* v. *Hallam* (1957) 41 Cr.App.R. 111, the prosecution had to prove that the accused had possession of the explosive substance and that he knew the substance to be explosive. In the present case the only direction given was in regard to possession and not in regard to knowledge that the things possessed were explosive. It might be that the chairman had failed to deal with the issue of knowledge because the word " knowingly " had been omitted from the indictment as drawn, and consequently had been omitted from the charge read out at the trial. In view of that lack of direction and the fact that the indictment was wrongly drawn, the appeals would be allowed and the convictions quashed. [H. P.]

Commentary. *R.* v. *Hallam* established that the prosecution must prove not only that the accused knew he had some substance in his possession, but also that he knew it was an explosive substance, overruling *R.* v. *Dacey* (1939) 27 Cr.App.R. 86, on this point.

GAMING

Gaming machine outside shop premises—lottery—charge under general section of Betting and Lotteries Act, 1934

Sales-Matic v. Hinchcliffe

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Ashworth and Hinchcliffe JJ.: October 7, 1959; [1959] 1 W.L.R. 1005.[3]

A company installed and maintained, outside certain shop premises, machines which were filled with coloured balls of chewing gum and a quantity of trinkets. The machine was operated by the insertion of a penny, in return for which the customer received either a ball of chewing gum or a ball of gum plus a trinket. It was purely a matter of chance whether or not the customer received a trinket in addition to a ball of gum. The presence of the trinkets induced customers to buy the gum.

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[3] For the appellant company: *J. Raymond Phillips* (instructed by Ward, Bowie & Co. for James A. Lee & Priestley, Bradford). For the prosecutor: *Geoffrey Baker* (instructed by Wilkinson, Howlett & Moorhouse for W. H. Leatham, Town Clerk, Bradford).

The company was charged with and convicted of unlawfully conducting a lottery outside shop premises by means of a bubble-gum machine, contrary to section 21 of the Betting and Lotteries Act, 1934. Section 21 provides: "Subject to the provisions of this Part of this Act, all lotteries are unlawful." On appeal to the Divisional Court:

Held, allowing the appeal, that section 21 was a declaration in general terms that all lotteries were unlawful, and that the section did not create an offence.

Per Lord Parker C.J.: "Whether if this company had been charged under section 22 they could have been held guilty, I do not know." [D. C.]

Commentary. The fact that section 22 is headed "Offences in connection with lotteries" and enumerates a number of specific acts such as printing tickets, selling tickets, using premises, etc., which are declared to be offences, seems to point to the conclusion reached by the court that the general declaration of illegality made by section 21 creates no offence.

The only provision in section 22 within which it would seem not unreasonable to bring the facts of the present case is 22 (1) (*f*), which relates to causing or knowingly permitting any premises to be used for purposes connected with the promotion or conduct of the lottery. Lord Parker thought it was probable that "whoever was considering the matter thought that it was difficult to say that part of a pavement outside a shop was premises, and they fell back then on the general provisions of section 21." Presumably the machine was on private property and not on the public footpath which was the part of the highway. (If it were on the highway, this, no doubt, would be indictable as a public nuisance.) It would seem very reasonable to hold that the forecourt of a shop is "premises" for the purposes of the section under consideration as it no doubt is for the purposes of the Occupiers' Liability Act, 1957. *Cf. Jacobs* v. *L. C. C.* [1950] A.C. 361.

HABEAS CORPUS

British protectorate—jurisdiction to issue writ overseas

Ex p. Mwenya

Court of Appeal: Lord Evershed M.R., Romer and Sellers L.JJ.: October 26, 1959: [1959] 3 W.L.R. 767.[4]

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[4] For M.: *John Foster, Q.C.*, *Neil Lawson, Q.C.*, and *Bryan Anns* (instructed by Potel, Tattersall & Lake). For the Secretary of State for the

In 1957 the Governor of Northern Rhodesia made restriction orders, under powers arising under the Emergency Powers Regulations, 1956, of Northern Rhodesia, requiring M., a native of Northern Rhodesia, to remain in the district of the Chief Mporokoso. At all material times Northern Rhodesia was a protectorate, and, according to an affidavit sworn by the Secretary of State for the Colonies, was " a foreign country within which Her Majesty has power and jurisdiction by treaty, grant, usage, sufferance and other lawful means within the meaning of the Foreign Jurisdiction Act, 1890, but not recognised by Her Majesty as, nor is it, part of Her Dominions, but she has power and jurisdiction within the same."

M. applied for a writ of habeas corpus, directed to the Governor of Northern Rhodesia, the District Commissioner of the Mporokoso District and the Secretary of State for the Colonies, on the ground that he was unlawfully detained, in that the Order in Council under which the Emergency Powers Regulations had been made was invalid, in that they failed to comply with the Rules Publication Act, 1893, and that, consequently, the restriction orders were invalid.

Under the Constitution of and legislation in regard to Northern Rhodesia, the Secretary of State had powers which extended beyond mere advice, but his approval or consent to the restriction orders was not required, and he took no part in the detention.

On preliminary objections taken by the respondents to the jurisdiction of the court to issue the writ in the circumstances, and on the assumptions (which were not admitted) (*a*) that M. was a British subject, (*b*) that the Order in Council was invalid, and (*c*) that M.'s confinement was of such a nature as to enable him, had he been confined in this country, to apply for the writ:

Held, allowing an appeal from the Divisional Court [1959] Crim.L.R. 657, that the jurisdiction to issue the writ of habeas corpus out of the Court of Queen's Bench was not limited to territories outside England, which were strictly called " colonies or foreign dominions," but extended to territories which, having regard to the extent of the dominion in fact exercised, could be said to be " under the subjection of the Crown " and in which the issue of a writ would be regarded " as proper and efficient," and that if, upon a proper investigation of the facts it appeared that the internal

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Colonies: *Sir Reginald Manningham-Buller, Q.C., A.-G.*, and *J. R. Cumming-Bruce* (instructed by the Treasury Solicitor). For the Governor of Northern Rhodesia and the District Commissioner of the Mporokoso District: *B. J. M. MacKenna, Q.C.*, and *J. G. Le Quesne* (instructed by Charles Russell & Co.).

governance of Northern Rhodesia was in legal effect indistinguishable from that of a British colony or country acquired by conquest, then in conformity with the nature of the writ there was no reason for denying the jurisdiction of the court to issue it. [D. C.]

Commentary. It is very important to note the limits of the present decision. It does not decide that the Court of Queen's Bench has jurisdiction to issue the writ in respect of a detention in Northern Rhodesia or any other protectorate. It goes no further than to hold that the mere fact that the place, in which the applicant is detained, is described as " a protectorate " does not, in itself, deprive the court of jurisdiction. In any given case an inquiry will be necessary into the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown. In the present case, such an inquiry would have been necessary into the position of Northern Rhodesia had not the Governor of that Protectorate rendered further proceedings unnecessary by revoking the restriction order in respect of Mwenya: [1959] 3 W.L.R. 791.

If the jurisdiction in fact exercised in a protectorate is indistinguishable in legal effect from that which might be acquired by conquest, then it is clear that the writ will run. Where the jurisdiction exercised is less in extent than this, the matter is open and " will depend on the facts of those cases when they come before the court." If the powers of the Crown were so limited that the court's order could not be enforced, then it appears clear that the writ would not issue; so too, perhaps, where " our powers and activities were so limited and restricted that there would be conflict and confusion, if not open hostility, with the internal government of the territory in question if the order were sought to be enforced."

The courts are always unwilling to answer hypothetical questions and the judges expressed their uneasiness at being called on to decide this point, which only arose if a number of unproved facts were assumed —*e.g.*, that Mwenya's confinement (to an area of 1,500 square miles) was detention of such a nature as would entitle him, if he had been confined in this country, to the writ.

Description of offences in notice of previous convictions qualifying prisoner for a sentence of corrective training

Ex p. Hastings

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Cassels and Diplock JJ.: *The Times*, November 11, 1959.[5]

H. had been sentenced to corrective training. On an application for a writ of habeas corpus, H. contended that the sentence of imprisonment which had been passed upon him was unlawful because the notice, which was required to be served on him by section 23 of the Criminal Justice Act, 1948, was defective in that one of the offences set out in the notice had been wrongly described.

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[5] H. appeared in person.

Held, refusing the application, that the other offences in the notice (which had been correctly set out in the notice) amply qualified H. for a sentence of corrective training. [D. C.]

ROAD TRAFFIC

Collision—damage to corporation property—liability of person damaging property where act involuntary

Kensington Borough Council v. Walters

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Cassels and Edmund Davies JJ.: October 29, 1959; [1959] 3 W.L.R. 945.[6]

Mr. Walters was driving his car along the Cromwell Road in Kensington, when another car collided with him, and drove him into collision with a street refuge. The Kensington Borough Council sought to recover the cost of repairing the refuge from Mr. Walters, pursuant to section 181 (3) of the London Government Act, 1939. Section 181 (3) provides: "If any person accidentally or carelessly damages any property vested in a local authority, the authority may recover from him summarily . . . the expenses incurred by it in making good the damage." The justices, being of the opinion that the driver of the other car was solely responsible for the collision and the damage which had been done to the refuge, dismissed the council's complaint. On appeal to the Divisional Court,

Held, allowing the appeal, that section 181 (3) referred only to the person who actually did the accidental or careless act, whether voluntarily or involuntarily: the Act gave a speedy remedy to a local authority to enable them to recover expenses incurred in repairing damage, without having to consider who was blameworthy.

Per Cassels J.: "If a man walking along High Street, Kensington, was pushed through a window belonging to the local authority, the authority receiving him on the other side of the window could hold out their hands and say 'the damage is so much'." [D. C.]

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[6] For the council: *Paul Wrightson* (instructed by Mr. J. Waring Sainsbury, Town Clerk, Kensington). Mr. Walters appeared in person.

Commentary. The case depended entirely on the correct interpretation of the section in question. With great respect, it is very difficult to see that the interpretation adopted by the court is a reasonable one. It was surely untrue to say that the defendant had either accidentally or carelessly *damaged any property*. Lord Parker said: "I think that section 181 (3) [of the Act of 1939] does not relate to anybody but the person who actually does the accidental or careless act, whether voluntarily or involuntarily, as in this case where he was forced into the street refuge." But the defendant did no accidental or careless act which caused damage. He was simply driving his car along a road when it was propelled into the refuge. "Being propelled" is not an act. Could the defendant be said to have damaged the refuge if he had left his car parked at the roadside and it had been propelled into the refuge while he was making a purchase in a shop? Surely not, for he could not then be said to have done any act; and the present case seems to be essentially the same. Indeed, Lord Parker seems to consider these cases to be the same, for he said: "[The local authority] are entitled under this subsection to recover from the person whose hand or vehicle has actually come in contact with and damaged their property."

The illustration referred to by Cassels J. seems, with respect, to be less remarkable than the actual decision. It could be said that the man who fell through the window had "damaged the window" in the sense that his person did the damage; in the actual case, even this would not be true. The defendant had no more "damaged the refuge" than I have broken a window if a boy takes my cricket ball without my consent and throws it through a window.

No doubt the word "accidentally" is intended to cover the person who causes damage without negligence; *e.g.*, the driver who, through no fault of his own, skids on a greasy road into a street refuge. Such a case is distinguishable from the present. If I press the trigger of a gun which I reasonably believe to be unloaded and it goes off and kills P., I have accidentally killed P.; but if, while I am holding in my hand a gun which I reasonably believe to be unloaded, D., without my consent, squeezes my hand and causes the gun to go off and kill P., I have *not* killed P.

Third party insurance—whether a car immobilised on the road is "used"

Elliot v. Grey

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Cassels and Edmund Davies JJ.: October 29, 1959; [1959] 3 W.L.R. 956.[7]

E. was charged before the justices with using a motor-vehicle on a road without there being in force in relation to the user of that vehicle a policy of insurance, contrary to section 35 (1) of the Road Traffic Act, 1930.

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[7] For E.: *James Miskin* (instructed by Messrs. Amery-Parkes & Co.). For the prosecutor: *Frank Whitworth* (instructed by Messrs. Speechly, Mumford & Soames, for Town Clerk, South Shields).

The justices found that on February 7, 1959, E. was the owner of a car which was parked in the roadway outside his house. Another vehicle had collided with it. At that time there was no policy of insurance for the car in force. It appeared that on December 20, 1958, the car had broken down and that it could not be driven; and that immediately that had happened, E. had placed the car outside his house and had left it there. He had jacked it up so that the wheels were off the ground and had removed the battery. On appeal against conviction by the justices,

Held, dismissing the appeal, that E. was using the car on a road within the meaning of the section, and that he was accordingly guilty of the offence with which he had been charged. [D. C.]

Commentary. A motor-vehicle standing on the road clearly comes within the mischief aimed at by the Act, for it may be the cause of an accident to third parties whom the section is designed to protect. The decision thus achieves a desirable result from a social point of view. It is, moreover, it is respectfully submitted, a not unreasonable construction of the statute. It is clear, and was indeed conceded, that " use " is a wider term than " drive," which appears in other sections, and that it covers the intervening periods between driving. It was unsuccessfully contended that the word " use " was quite inapt to describe the keeping of a motor-vehicle which is out of action. Lord Parker pointed out that, although this car could not be driven, there was nothing to suggest it could not be moved; and he did not find it necessary to decide what would be the position of a car which was completely immobilised as, for example, by having all its wheels removed. In a case decided in Acton Magistrates' Court on December 2, 1959, the present case was followed where a car's rear wheels were jacked up, presumably rendering it immobile. Prosecuting counsel pointed out that even when a car was stationary, a third party might still be injured—for example, a car might run into the back of it in a fog (*The Times*, December 4, 1959). The decision seems to be one with important practical results; in the Acton case the accused is reported to have said that in the district where he lived there were " hundreds of cars lying about in a dilapidated condition." These cases are therefore a valuable weapon in the hands of the police in keeping the roads clear; but the Acton police (very properly, it is submitted) declared their intention of giving people a reasonable time to remove their uninsured cars.

SENTENCE

Description of offences in notice of previous convictions qualifying prisoner for a sentence of corrective training

See *Ex p.* HASTINGS, p. 61, *ante*.

Principles of Punishment

Sentences in the Court of Criminal Appeal

Prepared by HENRY PALMER, *Barrister-at-Law*

Probation

In R. *v.* BELL the court (Lord Parker C.J., Cassels and Diplock JJ.: November 9, 1959) varied a sentence of borstal training to probation for three years. B. had pleaded guilty at quarter sessions to offences of shopbreaking and larceny. B., who was a young man of eighteen years of age, had two previous convictions for larceny and one for assault. For the first offence of larceny he had been sent to an attendance centre; for each of the other offences he had been fined. The present offences were committed by B. in company with his younger brother aged seventeen and two other youths aged nineteen and sixteen. They broke into a community centre and stole some playing cards and, later, they stole four airguns and other property from a fairground stall. The three others involved were put on probation. B. had been in a boy's prison for just over three months when the appeal was heard. The court stated that the sentence of borstal training had been the only possible sentence, but certain further facts had now come to light. There was now a full probation officer's report which showed that B. came from a good home and that his parents thought they could ensure that nothing of this sort would happen again. Further the governor of the boy's prison had reported that B. had conformed very well to discipline and that he might well have learnt his lesson already. On the whole this court felt they could take a chance and, accordingly, a probation order for three years would be substituted for the sentence of borstal training.

Probation

In R. *v.* BUCKLAND the court (Lord Parker C.J., Cassels and Diplock JJ.: November 16, 1959) substituted a probation order for sentences totalling five years' imprisonment. B. had pleaded guilty at quarter sessions to offences of breaking and larceny. B., who was a man of twenty-two years of age, had seven previous convictions. He had been to approved school, borstal training and three years' imprisonment. He committed the first of the present offences only three days after release from prison. The court stated that B. had already been in prison for nearly five months. He now apparently realised that he was at the turning of the ways and, also, he had become skilled or semi-skilled since he had been in prison. B. was very young and this court felt that they ought to give him one last chance to prove himself. Accordingly, a probation order for three years would be substituted for the sentence of three years' imprisonment.

Imprisonment

In R. *v.* YAKIMOVITCH the court (Lord Parker C.J., Cassels and Diplock JJ.: November 16, 1959) reduced a sentence of three years' imprisonment to one of thirty months. Y. had pleaded guilty at quarter sessions to housebreaking and larceny of a watch valued at £15. Y., who was a man of twenty-two years of age, had nine previous convictions. He had been on probation and to approved school. The prison commissioners reported that Y. appeared to need a prolonged period of supervision and training. The court stated that there was nothing wrong in principle with the sentence imposed. However, the appellant had been in custody for nearly four months prior to sentence and had, therefore, served the equivalent of six months' imprisonment. Accordingly, this court would reduce the sentence by six months to one of thirty months' imprisonment.

Acts and Orders*

London Traffic

The following Orders have been made detailing prescribed routes: S.I. Nos. 1865 (Caterham) (2d.); 1866 (Finsbury) (3d.); 1867 (Purley) (2d.).

The following Order has been made prohibiting waiting: S.I. No. 1868 (Walton and Weybridge) (3d.).

Road Traffic

Previous Regulations regarding road transport lighting are consolidated with minor amendments. The consolidated Regulations are S.I. 1954, Nos. 1105 and 1281; 1955, No. 1984; and 1958, Nos. 153 and 819. The main changes are that (1) by virtue of Regulations 4 (*a*) and 8 (1) (*a*) (which contain provisions as to the maximum height from the ground at which front lamps may be fixed on vehicles) certain exemptions from those provisions are made in relation to vehicles propelling snow ploughs and vehicles being aerodrome fire tenders, and (2) by virtue of Regulation 29 (2) (*c*) and 3 (*c*) new provision is made in the case of certain vehicles of the home forces and of the visiting forces of Canada and the United States of America as to the maximum height from the ground at which rear lamps and reflectors may be fixed on those vehicles. Operative November 24, 1959. ROAD VEHICLES LIGHTING REGULATIONS, 1959 (S.I. No. 1869) (1s. 3d.).

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* Prepared by F. Maurice Drake, *Barrister-at-Law*.

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 11 *New Fetter Lane, London, E.C.4." The questions of readers only are answerable in the Review. All questions should be submitted in triplicate. The Publishers cannot accept any responsibility for the correctness of the replies.*

64. *Driving licence—whether an expired licence is a "licence"*

A man sent to the licensing authorities of this city, together with a renewal application form, a driving licence on which, for some obscure reason, he had over-written the date of issue and expiry in such a way as to correspond with the date on which he had posted the documents, whereas the licence had in fact expired some four years previously.

The man was subsequently interviewed by the police and he admitted having over-written the details on the licence but alleged that he had done so because the original writing had become illegible due to the effects of wet weather. He denied having altered the year of issue and expiry and stated that the dates shown were the correct ones but this has been disproved by reference to the licence number and inquiries made at the office of issue.

The question that now arises is this, can this man be summoned for an offence contrary to section 112 of the Road Traffic Act, 1930, *i.e.*, "with intent to deceive altering . . . a licence under any Part of this Act." There is an opinion that as the licence was expired when the licence was altered the offence is not disclosed because it was no longer a licence and of no more value than an ordinary piece of paper.

The only definition of licence that I can find under the Road Traffic Acts is at section 4 (8) of the 1930 Act which states, "In this Part of this Act the expression licence means a licence to drive a motor-vehicle granted under this Part of this Act."

To my mind this does not clarify the position as the definition expressly confines the definition to " this Part of this Act " which in that case is Part I, whereas section 112 is in Part VI of the Act.

The position appears to be a very open one and in my opinion it would be better under the circumstances to prosecute under another limb of the same section, namely, " to forge a licence under any Part of this Act " as I consider that by altering the date the forgery is complete and it matters not whether the licence is an expired one.

Your opinion would be valued on the material point as to whether an expired licence is a licence for the purpose of section 112 and any other comment you care to make. [L. W.]

ANSWER

In my opinion it is quite clear that no offence has been committed against the provisions of section 112 (1) of the Road Traffic Act, 1930.

Section 112 (1) creates a number of offences with the common element of intent to deceive, amongst which are (a) forging a licence and (b) altering a licence.

In my opinion the used and expired document which this man altered was not a licence at all—whether within the meaning of the Road Traffic Acts or within the meaning of ordinary English language. A licence of any kind, whether to drive a motor-vehicle, to hold firearms, or to make over someone's land is, essentially, a *permit* to do something. But the document altered by this man permitted him to do nothing; it was indeed, as suggested in your question above, no more than a valueless piece of paper. If the owner wished to tear it up or throw it away he would be committing no offence of any kind.

It is, however, possible that the facts do disclose an offence under section 112 (2) of the same Act which provides:

" If any person for the purpose of obtaining the grant of any licence . . . makes any false statement . . . he shall be liable to a fine not exceeding £50 or to imprisonment for a term not exceeding 6 months, or to both such imprisonment and fine."

Now in this case it would seem that the only likely reason for the alteration made by this man is that he was afraid he might not be granted a new licence if it was shown that there had been a lapse of four years since his last one expired; and there may, of course, have been powerful reasons why he should wish to conceal this gap, *e.g.*, disqualification during that period.

The alteration of the date can I think quite clearly amount to the making of a false statement. If put forward as a representation intended to mislead the licensing authorities it would, I do not doubt, be just as much a false statement as would a false matter set out in the body of the usual application form.

Thus I think this alteration *could* amount to the making of a false statement for the purpose of obtaining the grant of a licence, contrary to the provisions of section 112 (2) of the 1930 Act.

But whilst the ingredients of this offence *may* here be present it would be essential for the prosecution to prove *beyond* reasonable doubt not only that the false statement had been made but that it had been made for the purpose of obtaining a new licence. The demonstrably wrong explanation of his motives for altering the date which the man has given support the theory that he had some ulterior motive—but in the absence of an express admission from the accused I think the case would be extremely difficult to prove. [M. D.]

Books and Periodicals

Book reviews:

The Chief. By Robert Jackson. London: George G. Harrap & Co., Ltd. 1959. 349 pp. 21s. net.

Gordon Hewart was one of a long line of Englishmen who made the law their ladder from humble origins to a leading place in the nation. The son of a Bury draper, Hewart's life was an almost uninterrupted story of success. After an early struggle in journalism a successful practice at the Manchester Bar led on to Parliament, a place in the Government, first as Solicitor-General and then as Attorney-General and finally to the Bench as Lord Chief Justice.

Mr. Jackson gives a readable account of the events of this success story. Hewart emerges as a dour forceful man of abundant ability, armed with a somewhat sarcastic wit. The harsh lines of this portrait are softened by his deep devotion to his family and his abiding affection, first instilled in him by Dill at Manchester Grammar School, for the classics.

Throughout his life Hewart's prime interest was the law. His contribution to it, however, was not substantial. Indeed, his partisan approach to the cases he tried during his long tenure of the Lord Chief Justiceship was sometimes less than creditable. The only consolation to counsel appearing before him was that he was at least fighting equally hard on both sides of the case. He is probably best known for his book *The New Despotism*, a fierce attack on the increasing power of the civil service at the expense of the legislature. The book was a major expression of that dissatisfaction which led to the setting up of the Donoughmore Committee. It did not, however, provide a very acute analysis of the problem. Hewart was chiefly concerned at the growth of delegated legislation. About an Act "which provided that rules might be made under the Act to have the same force as the rest of the Act" Hewart said, "what honest or reasonable excuse is there for legislation of that class?" But if regulations are to have any force at all they must have full statutory force. There is still far to go in securing a satisfactory relationship between legislature, executive and people. Hewart's contribution did little more than exacerbate the protagonists without elucidating the problem. It is interesting to learn that later in life Hewart came to regret having written *The New Despotism*.

The great interest of Mr. Jackson's book is the account, here given for the first time, of Hewart's appointment as Lord Chief Justice. Lord Reading, who had been the incumbent during the First World War, was anxious to succeed as Viceroy of India when that post fell vacant in 1920. Hewart claimed that, by tradition, as Attorney-General, he had the right to succeed Reading. Lloyd George, however, found Hewart too useful to release him and finally succeeded in persuading Hewart, after much heart-searching on the latter's part, to agree to an arrangement whereby an elderly judge should be prevailed on to accept the vacancy on condition that he relinquish it in Hewart's favour when Lloyd George could afford to lose him. One of Hewart's essential conditions was that an announcement should be made that the post had been offered him and that he had refused it. In the event no announcement was made and Lord Trevithin, the judge selected, read of his own retirement in *The Times* one morning some two years later.

The compact was shameful. Lloyd George's part in it can redound only to his discredit, not least for the wholly unconstitutional dismissal of a judge at the whim of a Prime Minister. Hewart's own part was dictated throughout by his reliance on the tradition that the Attorney-General of the day had a right of succession to the retiring Lord Chief Justice. Recent events have given this tradition its death blow. In 1920, however, it had considerable colour of validity. The position is complicated by the fact that until 1875 there were three posts of roughly comparable rank, Chief Justice of the Common Pleas, Chief Justice of the Queen's Bench and Chief Baron of the Exchequer. There are few instances of these posts throughout the eighteenth and nineteenth centuries being held by other than lawyers who had been Attorney-General. Coke himself was only one of many. In 1856 Greville was able to write, on the Chief Justiceship of the Common Pleas falling vacant, "according to established (but as I think bad) usage, the Attorney-General, Cockburn, had a right to take the place." Greville's parenthesis provides the clue. The tradition was a relic of earlier patronage which had persisted into a later age. It seems clear that, however bad the tradition, Hewart had more than a colour of right in his claim. His stand, therefore, appears less as self-seeking than as an attempt to retain unimpaired the perquisites and rewards of Attorney-General.

Mr. Jackson has been hampered by his lack of legal qualifications and he is not at ease with the technicalities of the law. Partly for this reason his accounts of the many trials in which Hewart featured make heavy going. Nor is he helped by misprints which (like "right of mandamus" for "writ of mandamus" on p. 180 and the confusion of Miles Seton and his uncle on p. 89) make hay of the sense. It is also disturbing to find a reference to the Industrial Syndicalist Education League (formed in the last years of the first decade of this century) beginning its campaign "following the ghastly slaughter at Peterloo, where troops attacked Manchester strikers." The massacre at St. Peter's Fields in 1819, when troops attacked a crowd assembled to hear the Radical orator, Hunt, campaigning for manhood suffrage, had no connection whatsoever with the activities of Tom Mann and his friends.

These are points of detail. A more substantial criticism is that Mr. Jackson, despite a wealth of anecdote (some of which can only questionably be attributed to Hewart) and many quotations from Hewart's writings and speeches, has not really succeeded in giving us the full measure of the man. It is difficult to understand what it is in Mr. Jackson's Hewart that made Lloyd George so reluctant to lose him. Rather than an uncertain recollection from Judge Tudor Rees of Hewart's verbal slaughter of a Private Member's Bill for Leasehold Enfranchisement (the Official Report does not disclose that Hewart ever made such a speech) we would have preferred a better documented account of Hewart's Parliamentary career. Above all there is a lack of a truly sympathetic account of Hewart's ideas. Perhaps the fault was Hewart's. By all accounts he hardly seems to have encouraged sympathy.

Despite its limitations, Mr. Jackson's book is one we could not readily do without. It is a comprehensive account of a leading legal character and, if not perhaps a full-length portrait, has the merit of not concealing its subject's warts. As a sketch it is more than adequate.

G. I. DE D.

The Campden Wonder. Edited by Sir George Clark. Oxford University Press. 1959. 151 and (index) 3 pp. 18s. net.

This, the latest of the books to deal with the seventeenth-century mystery traditionally known as the Campden Wonder, contains, in addition to Sir Thomas Overbury's almost contemporary account and reprints of essays by Paget and Andrew Lang, chapters by the late Lord Maugham and Dr. D. Russell Davis, who is Reader in Psychopathology in the University of Cambridge.

As is probably well known, the Campden Wonder was the disappearance in 1660 from the Gloucestershire village of Chipping Campden of William Harrison, steward to the local lady of the manor, and his return two years later, during which time John Perry, a servant in Harrison's employment, had been executed, together with his mother and brother, on Perry's own confession that they had robbed and murdered his master.

If, as seems likely, Perry was deranged, what became of Harrison during his two years' absence? Andrew Lang suggested that Harrison's presence at Campden was inconvenient to someone of importance. Lord Maugham thought that he may have misapplied money belonging to his mistress and that he absconded at the time when he believed that his defalcations were about to be discovered.

In his Introduction the Editor claims for his volume that "its modest aim is to show how in one particular instance historians have unravelled the lies about a crime. It is a detective story, and it abides by the rules of that genre."

Although it may fairly be said that this re-examination of the existing evidence serves to clarify the nature of the medical and legal problems involved, especially the reasons for Perry's voluntary confession, the reader is left with a sense of incompleteness which is at odds with the mass of information which the book contains. The cardinal requirement of a detective story is that it shall have a solution and this the present volume does not provide. However ingenious Dr. Davis's theories regarding Perry's mental state and however penetrating Lord Maugham's account of the legal and historical background to the problem, no sustained attempt is made to provide any new answer to the mystery of Harrison's disappearance and subsequent reappearance.

Historians will object that history is rarely as amenable to discipline as a detective novel, but the unrepentant reader will answer that since the Campden Wonder has, in this instance, attracted the attention of so distinguished a group of writers this would have been an opportunity to attempt to make it so.

R. C. C.

Books received:

Road Transport Law. 12th edition by L. D. Kitchin, A.M.INST.T., revised by E. K. Wenlock. London: Iliffe & Sons. 1959. 139 pp. 13s. 6d. net.

Readers' digest:

Costs: of acquitted defendants: 103 *Solicitors' Journal* 866.

Murder: drunkenness as a defence: 228 *Law Times* 204.

Obscenity: Obscene Publications: the new Act: 103 *Solicitors' Journal* 904.

Prostitution: The common prostitute: 67 *Police Review* 752, 772, 796.

Recognisances: Recognisances at common law: 228 *Law Times* 202, 218.

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Books for review should be sent to the Publishers at the above address.

THE
CRIMINAL LAW
REVIEW

February 1960

Royal Commission on Police

The terms of reference of the Royal Commission set up to inquire into police matters were announced by the Prime Minister on December 16, 1959. They are:

> To review the constitutional position of the police throughout Great Britain, the arrangements for their control and administration and, in particular, to consider:
>
> (1) the constitution and functions of local police authorities;
>
> (2) the status and accountability of members of police forces, including chief officers of police;
>
> (3) the relationship of the police with the public and the means of ensuring that complaints by the public against the police are effectively dealt with; and
>
> (4) the broad principles which should govern the remuneration of the constable, having regard to the nature and extent of police duties and responsibilities and the need to attract and retain an adequate number of recruits with the proper qualifications.

We welcome the framing of this reference in such wide terms. It is, however, regrettable that, in answer to a question concerning the terms of reference, the Prime Minister should have expressed himself doubtful as to whether the terms of the inquiry cover such matters as police powers and procedure. Mr. Macmillan seemed to consider these matters too specialised for consideration by the Commission and referred his questioner to the Royal Commission on Police Powers and Procedure which reported in 1929.

The better view of this aspect of the subject, and the one which it is hoped that the Commission will take is that these matters fall quite clearly within the third subsection of the terms of reference, as affecting the relationship of police and public and as being matters which give rise to complaints by the public.

Detention centres

The Home Office has recently issued a circular[1] outlining the result of Dr. Max Grünhut's research into the effects of detention in detention centres.

Dr. Grünhut, who is Reader in Criminology at the University of Oxford, summarises the result of his findings as follows:

> "On the whole, an analysis of reconvictions confirms the impression of previous investigations that absence of considerable previous convictions and of previous institutional experience, and—in the case of the junior centre—of an unsatisfactory background, indicates the best chance for a successful outcome of punitive detention. The original proposition is confirmed that punitive detention appears suitable for boys with a more or less substantial criminality not due to deep-rooted personal factors or seriously adverse home conditions, for whom detention is the first experience of any form of institutional treatment."

The report is based on an examination of the records of 434 boys discharged from a junior centre and 144 boys discharged from the senior centre. The analysis of reconvictions dealt with a period of two years from the date of discharge.

The Home Secretary thinks that magistrates may find it useful to keep Dr. Grünhut's findings in mind when dealing with particular cases. The courts to whom detention centres are available are making full use of them and the demand for vacancies is often so great that boys who would be likely to benefit from punitive detention have to be dealt with in some other way. In these circumstances it is especially important that places at the detention centres should not be occupied by boys unlikely to benefit from this treatment.

We therefore congratulate the Home Office on making available the general results of Dr. Grünhut's research before they are published in full and thus enabling the courts to put their power to commit to a detention centre to the best use.

The employment of prisoners

The Home Secretary and the Secretary of State for Scotland have decided to appoint an Advisory Council on the Employment of Prisoners, with the following terms of reference:

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[1] CRI 216/1/55.

> "To be a standing council to advise on the organisation and management of industries in prisons and borstals, including the supply of sufficient and suitable work; the development of other forms of employment for inmates; the industrial training of inmates; and related questions."

Sir Wilfred Anson, who was until recently Deputy-Chairman of the Imperial Tobacco Co., will be the first Chairman of the Council, and its members, whose names will be announced in due course, will include Members of Parliament, representatives of industrial management and from trade unions, and other members with an interest in the problem of finding suitable work for prisoners. Since 1933, when the employment of prisoners was considered by a departmental committee, changes have taken place both in industrial methods and in the organisation of the prison system. The number of inmates for whom employment must be found has more than doubled. These factors have created new problems which call for review by persons with experience of the problems of industry in a wider field.

The Home Secretary has also approved the appointment of Mr. Gilbert Hair, at present Governor of H.M. Prison, Wormwood Scrubs, to be an Assistant Commissioner specially concerned with industrial development. Mr. Hair will act as an assessor to the Advisory Council, together with representatives of the Scottish Home Department and the Ministry of Labour.

Time spent awaiting trial

The Home Office Research Unit has now published its first report. It deals with the question of time spent awaiting trial and is based on a sample survey of courts throughout the country.

For persons committed for trial at higher courts the average time between committal for trial by a magistrates' court and the first day of trial at a higher court was about five weeks, but there was a considerable range of difference: 20 per cent. of persons waited under two weeks and 21 per cent. waited eight weeks or more.

There was considerable variation between courts, related mainly to the frequency of sittings. The London higher courts and the Crown Courts at Manchester and Liverpool sit almost continuously and have less than the average delay. Long delays are common at assizes, which generally sit only three times a year. If the local court is not due to sit within a month, delay can be reduced by committal to a "convenient court" in another area; 7 per cent. of persons were so committed.

The longest delays occurred at large assizes outside London. The average delay for those tried at assizes in their own county was nearly eight weeks, compared with four weeks for those committed to a "convenient court"; 12 per cent. were so committed. Of those tried locally, nearly half waited more than 8 weeks; 19 per cent. waited 8–12 weeks, 11 per cent. waited 12–16 weeks, and 9 per cent. waited 16 weeks or more. Small and medium assizes had only slightly less delay.

Quarter sessions sit more frequently than assizes, and large quarter sessions had less than the average delay; but at small and medium quarter sessions, about a third of those tried locally waited more than 8 weeks.

In every type of court, the average interval was shorter for persons in prison than for those on bail, and for persons pleading guilty than for those pleading not guilty. 40 per cent. of all persons committed for trial were in prison for the whole waiting period, which averaged 4½ weeks; for the remainder, it averaged nearly 6 weeks.

The delay was less in cases of "breaking and entering" than in other cases. Those charged with "breaking and entering" more often plead guilty, more often have a bad record, and are more often committed in custody.

90 per cent. of persons committed for trial had previously been remanded while the case was before the magistrates' court. Those committed in custody had usually been remanded in custody, for an average period of a fortnight. In addition, just over a quarter of those committed for trial on bail had been remanded in custody at least once.

Only 4 per cent. of those committed in custody were acquitted, but 21 per cent. were not sent to prison or any other form of detention after conviction.

The Report also considered delay in the magistrates' courts, factors affecting bail and the effect of delay on the population figures of prisons.

The picture revealed by the figures in this Report is far from satisfactory and it is to be hoped that the Streatfeild Committee on the Business of the Criminal Courts, before whom the Report has been laid, will find some solution to the problem of delay.

Meanwhile, in an effort to speed up hearings in the London Magistrates' Courts, Sir Laurence Dunne, the Chief Metropolitan

Magistrate, has written to magistrates within the metropolitan area asking them to be prepared to sit longer hours.

His letter follows an interview which Sir Laurence Dunne had with the department of the Lord Chancellor, during which the Lord Chancellor's views on the period which should satisfactorily elapse between the serving of a summons and the hearing of the case were made clear.

Sir Laurence Dunne passes on to the magistrates these periods, which range from three weeks for serious indictable summonses to six weeks in domestic cases. A period of six weeks is suggested for cases in which a public authority is concerned, four weeks for ordinary police summonses and dangerous and careless driving summonses, and four to five weeks in the case of private summonses. Two to three weeks is suggested as a satisfactory period for an adjournment to secure an adequate hearing of a case.

The magistrates are told that the Lord Chancellor requires extra sittings to be undertaken to limit the intervals between process and hearing, notwithstanding the long hours already being sat by a number of courts.

No such request is being made at present to magistrates in the provinces, where the backlog of cases is not so great as in London.

British Academy of Forensic Science

At [1959] Crim.L.R. 683 we noted that a decision had been taken at a meeting convened by Dr. Francis Camps to establish a British Academy of Forensic Science. The Academy has now been formed. Its founder members are the members of the steering committee which, under the chairmanship of Dr. Leon Radzinowicz, was charged with drawing up the Academy's constitution and stating its policy. The steering committee has now been dissolved.

The academy will consist of three sections—law, medicine and science—each of which will have a separate committee and which may appoint subsections in special subjects. The Academy's objects are to encourage the study, improve the practice, and advance the knowledge of the forensic sciences, to hold meetings and to publish such material as is calculated to further the objects of the academy and generally to do all such things as may widen, improve and develop the education and knowledge, both of those actively concerned in the pursuit of the forensic sciences and of the public. Of the special committees to be set up, the most important is the Education and Research Committee.

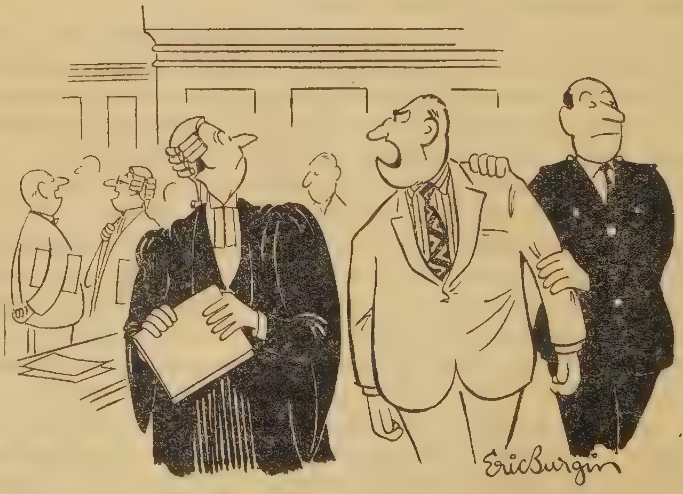
Membership of the Academy is by election only.

Lord Justice Devlin

The New Year brought with it a number of changes in the judiciary. Of particular interest to criminal lawyers is the appointment of Sir Patrick Devlin to the Court of Appeal. This appointment, though long expected and well deserved, may nonetheless be regretted in the criminal courts, where his reputation as a criminal lawyer stands second to none. The clarity of his judgments and directions to juries will be greatly missed in these courts.

Lord Justice Devlin's latest contribution to criminal law is to be found in his latest book, *The Criminal Prosecution in England*, which will be reviewed in a later issue of this *Review*.

Lord Justice Devlin is a member of the Criminal Law Revision Committee.



"You're the one who ought to be locked up!"

Fitness to Plead

By Michael Dean, ll.b.

The decision in R. v. Podola

In *R.* v. *Podola*[1] a full Court of Criminal Appeal (Lord Parker C.J., Hilbery, Donovan, Ashworth and Paull JJ.) upheld the ruling of Edmund Davies J., that whenever a person charged on indictment raises the preliminary issue that he is unfit to plead to the indictment, he bears a burden of proving such unfitness to the satisfaction of the jury on a balance of probabilities. The Criminal Lunatics Act, 1800, s. 2, provides that: " If any person indicted for any offence shall be insane, and shall upon arraignment be found so to be by a jury lawfully empanelled for that purpose, so that such person cannot be tried upon such indictment . . . it shall be lawful for the court . . . to direct such finding to be recorded, and thereupon to order such person to be kept in strict custody until His Majesty's pleasure shall be known."

There had been no appeal against the conviction of the accused, but the Secretary of State, being of the opinion that the Court of Criminal Appeal should consider the question of law as to where the onus of proof lay when the issue of the accused's fitness to plead was raised at a preliminary inquiry, had referred the whole case to that court under the provisions of section 19 (*a*) of the Criminal Appeal Act, 1907. The question had previously been the subject of different rulings in the High Court, and it submitted that the effect of the conflict of authority was such as to enable the Court of Criminal Appeal, especially when sitting as a full court, to consider the case as one of first impression. In support of the decision actually given the court cited *Dyson*,[2] as approved and followed in *Pritchard*,[3] *Turton*,[4] *Rivett*,[5] and the Scottish case of *Russell* v. *H.M. Advocate*.[6] The court overruled *Ley's Case*,[7] *Davies*,[8] and *Sharp*,[9] and disapproved a statement in Halsbury's *Laws of England*, 3rd ed., vol. 10, at p. 403.

The cases followed

Dyson and *Pritchard* were both cases where muteness by the visitation of God was raised as a plea in bar of trial on charges involving capital offences. In both cases the court was concerned principally with defining the issues in terms of questions to be put to the jury. The only specific advertence to the burden of proof would appear to be in the statement in the report that, " His Lordship [Parke J. in *Dyson*] told the jury, that if they were satisfied that the prisoner had not then, from the defect of her faculties, intelligence enough to understand the nature of the proceedings against her, they ought to find her not sane. They found her not sane." In *Pritchard* it was said that *Dyson* had been approved by several of the judges.

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[1] [1959] 3 W.L.R. 718; [1959] Crim.L.R. 847.

[2] (1831) 7 C. & P. 305.

[3] (1836) 7 C. & P. 303.

[4] (1854) 6 Cox 385.

[5] (1950) 34 Cr.App.R. 87.

[6] 1946 S.C. (J.) 37.

[7] (1828) 1 Lewin 239.

[8] (1833) 3 C. & K. 328.

[9] [1958] 3 All E.R. 62.

Turton is briefly reported, but it appears that counsel for the defence made a submission that his client was unfit to plead. He offered no evidence at all of this unfitness and said that the prosecution must prove fitness to plead. Cresswell J. replied: " Why is a man presumed insane when called upon to plead? The presumption is that he is sane. I do not see any sufficient reason for deviating from the old practice. If you suggest that the prisoner is not in such a state of mind as to be able to plead to the indictment you must give evidence of the fact." It is submitted that this case is not indisputable authority for the proposition that a prisoner saying that he is unfit to stand trial must prove it on a balance of probabilities. Cresswell J. said the defence " must give evidence " in support of their contention but he does not refer to the standard of proof required, and his words themselves suggest a lighter burden.

In *Rivett*, the Court of Criminal Appeal refused to reverse the jury's finding that the accused was sane, in spite of medical evidence to the contrary. Virtually the same evidence was offered as a substantial defence at the trial as had been offered as a plea in bar. Stable J. had directed the jury to come to their verdict on the whole of the evidence in deciding whether they were satisfied that the accused was not fit to plead, and this direction was approved by Lord Goddard C.J. in the Court of Criminal Appeal. The court were really concerned to emphasise that the question as to the accused's sanity was to be determined by the jury and not by medical witnesses, however eminent, and the incidence and nature of the burden of proof was never really an issue.

This leaves the Scottish case of *Russell* v. *H.M. Advocate*, where the Lord Justice-Clerk, Lord Cooper, said, in giving the opinion of the court on an appeal where hysterical amnesia had been raised as a plea in bar (as in *Podola*), that: " The onus is always on the accused to justify a plea in bar of trial . . . to the satisfaction of the court." The decision, though of strong persuasive authority, was not binding on the English Court of Criminal Appeal in *Podola*.

The court refused to follow the line of authority shown by *Davies*, when Williams J. directed that, though the nature of the investigation when the accused raised a plea in bar was an inquiry rather than an issue joined, the prosecution had the burden of establishing that the accused was fit to stand his trial. In *Ley's Case*, a case concerned with the 1800 Act, it was held that it was the duty of the prosecution to prove that the accused was fit to plead. Salmon J., in the recent decision in *Sharp*, appeared to hold, that, though the report is not too clear, where the accused alleged that he was mute by the visitation of God in bar of trial, the burden of proving that he was fit to plead was on the prosecution.

These being the relevant authorities, it is submitted that the full Court of Criminal Appeal was not bound to follow one line rather than the other, and the case was, in effect, one of first impression.

The burden of proof

The court rejected the contention of counsel for Podola, that the proceedings on the issue of the fitness of the accused to stand trial, being an inquiry as opposed to an actual trial, the question of the incidence and nature of the burden of proof was not relevant. The court pointed out that frequently the matter would not be contested, and "in such cases, although the jury must be satisfied of the accused person's insanity before so finding, the question of onus of proof is not a live issue.". Yet where the matter was contested the question of the burden would arise. It is respectfully submitted that the court came to the correct conclusion in this. The distinction must be drawn between a mere inquiry to inform the body inquiring of all the facts and circumstances, and an inquiry upon the result of which the court will be required to take positive action, one way or the other. In the latter case, the person urging the action must undertake some obligation to prove facts to justify its being taken. The court in *Podola* was required to define the exact nature and extent of the obligation thus imposed. This is not defined in the Act of 1800, and the court, holding that there was in fact a burden upon the defence of satisfying the jury to some standard, defined the standard in these terms: "In such cases, as in other criminal cases in which the onus of proof rests upon the defence, the onus is discharged if the jury are satisfied on the balance of probabilities that the accused's insanity has been made out." It is submitted, with respect, that, in the words of Devlin J. in *Hill* v. *Baxter*,[10] ". . . there is also recognised in the criminal law a lighter burden which the accused discharges by producing some evidence, but which does not relieve the prosecution from having to prove in the end all the facts necessary to establish guilt." It is further contended, with the greatest respect, that, if the question was an open one, it would have been consonant with the principles as to the nature of the burdens of proof in a criminal case to have defined the obligation on the defence in terms of this lighter, or "evidential," burden. This would only have been possible if the fact that the accused was fit to plead to the indictment was one of the "facts necessary to establish guilt." It is urged that the fact that the accused is fit to stand his trial, and be made to answer the charge before a court of law, is an essential, if implicit, allegation made by the prosecution in bringing the charge at all. Support for this contention may be found in the judgment of the Court of Criminal Appeal in *Podola* itself. The Attorney-General, as *amicus curiae*, raised the question of the court's jurisdiction to hear the reference by the Home Secretary under section 19 (*a*) of the Criminal Appeal Act, 1907. He maintained that, as the court was required by the Act to hear and determine the case "... as in the case of an appeal by the person convicted ...," the court would only have jurisdiction under such a reference, where the person convicted would himself have had a right of appeal under the Act of 1907. In *Jefferson*,[11] Darling J. apparently ruled, that there could be no appeal to the Court of Criminal Appeal against a finding of fitness to plead, as the Criminal Appeal Act, 1907, only provided for an appeal against "conviction" and such a finding was not a "conviction." The court in *Podola* pointed out the fallacy in this reasoning and refused to follow the ruling, applying instead the principle laid down by Lord Sumner in *Crane* v. *D. P. P.*,[12] that a convicted person is entitled to contend that he "... should not have been given in charge to the jury as he was, or have been made the subject of any verdict at all, but should have had the proceedings stopped at the outset." Whether a person should have been given in charge to a jury is clearly a "fact necessary to establish guilt" and so, by denying this, the defence is not raising an independent issue on its own account but is merely denying that the prosecution have established all the elements of their case.

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[10] [1958] 1 Q.B. 277.

Put in these terms, the course before the court in *Podola* appears as a choice between two principles as to the nature of the burden of proof resting on the defence in a criminal trial. Both have the ultimate authority of the House of Lords to support them.

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[11] (1908) 24 T.L.R. 877.

[12] [1921] 2 A.C. 299 at 332.

On the one hand there is the rule as illustrated and expounded in cases such as *Woolmington.*[13] This is, that it is the duty of the prosecution to prove all the elements and essential allegations of their case; it is never incumbent upon the accused to prove his innocence. At the most, the accused may be required to raise a reasonable doubt as to whether the prosecution have in fact overcome their burden of proving guilt. This doubt may be raised by introducing prima facie evidence of the nature described by Devlin J. in *Hill* v. *Baxter*. This principle has been affirmed to be one of general application in criminal law: *Mancini*,[14] *Chan Kau*,[15] and *Lobell.*[16] However, apart from statute,[17] one exception is recognised: where the accused pleads insanity at his trial as a defence to the substantive charge under the M'Naghten Rules, he must establish such insanity to the satisfaction of the jury on the balance of probabilities: *M'Naughten's Case*,[18] *Sodeman*,[19] and *Carr-Briant.*[20] The court could have adopted the general rule of *Woolmington*, or the special case of insanity under the M'Naghten Rules, as the one to apply, directly or by analogy, to the question of the nature of the burden of proof upon the accused when he raised a plea in bar. It is submitted that Devlin J. stated the law correctly in *Hill* v. *Baxter*, at least prior to the decision in *Podola,* when he said: " . . . so far insanity is the only matter of defence in which under the common law the burden of proof has been completely shifted." It is further contended that Devlin J. was referring to the burden of proving insanity under the M'Naghten Rules, when it is raised as a defence at the trial, and that this constitutes an exceptional anomaly, in so far as it is not consistent with *Woolmington*. It can be explained, if not justified, by the historical accident that the principle was separately established prior to the decision in *Woolmington*. The so-called presumption of sanity amounts to little more than a description of the burden of proof on this issue.

Yet both Edmund Davies J. and the Court of Criminal Appeal, in effect, applied the principle of *M'Naughten*, so far as it relates to this issue, in preference to that of *Woolmington*, in defining the nature of the burden of proof on the accused when he raises a plea in bar of trial.

So far as the decision of Edmund Davies J. is concerned, it is respectfully submitted, that the wording of section 2 of the

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[13] [1935] A.C. 462.

[14] [1942] A.C. 1.

[15] [1955] A.C. 206.

[16] [1957] 1 Q.B. 547.

[17] The Act of 1800 is an Act declaratory of common law, so the question of a statutory exception is not relevant, and little can be found in it which helps to define the burden of proof.

[18] (1843) 10 Cl. & Fin. 200.

[19] [1936] 2 All E.R. 1138.

[20] [1943] K.B. 607.

Criminal Lunatics Act, 1800, may have had some influence. The Act only provides for a plea in bar where the accused shall be "insane." The learned judge pointed out that, where insanity is raised as a defence at the trial and the accused seeks to establish that at the time when he did the act he was suffering under such a defect of reason due to disease of the mind as to justify and call for a verdict of guilty but insane, he must establish such mental defect to the satisfaction of the jury on the balance of probabilities. Here he was obviously referring to insanity as understood under the M'Naughten Rules. He went on: 'That matter was dealt with by section 1 of the Criminal Lunatics Act, 1800, now replaced by section 2 of the Trial of Lunatics Act, 1883. Section 2 of the Act of 1800 deals with the matter upon which this court is now engaged, namely, as to the capacity of the accused to plead on arraignment. It uses the word 'insane.' . . . I cannot myself see any reason in law, logic or fair play why the approach to the application of those two sections contained in the same Act of Parliament should be different." Later, he directed the jury: ". . . the presumption of sanity includes a presumption that the accused person who is charged is fit to undertake to stand his trial upon the charge." It is respectfully submitted that, both legally and logically, there is no necessity for the same approach to sections 1 and 2 of the 1800 Act. The Court of Criminal Appeal in *Podola* drew attention to the fact[21] that the "insanity" under section 2 is not confined to the narrow definition of insanity under the M'Naughten Rules; nor has it been so limited by the courts in construing section 2: *R.* v. *Governor of Stafford Prison, Ex p. Emery*.[22] "Insanity" in section 2 includes the case of a deaf mute and also ". . . the case of persons who, from mental or physical infirmity, cannot follow what is happening in a case . . . ," even though such a person might be quite sane under the test as laid down by the M'Naughten Rules. It would seem that "insanity" as defined in *M'Naughten* would not be appropriate when considering the question of the accused's fitness to plead at the trial, as M'Naughten insanity is concerned solely with the state of the accused's mind when he did the act. The fact that the same word is used to cover two different concepts in the same Act of Parliament is unfortunate but it should not entail the result that the legal consequences applicable to one of these concepts should automatically be applicable to the other.

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[21] At pp. 731 and 734.

[22] [1909] 2 K.B. 81.

Effect of the decision

The Court of Criminal Appeal in following the rule of *M'Naughten*, rather than the principle of *Woolmington*, have extended the anomaly at the expense of the general rule and this by itself would appear regrettable. If the principle of *Woolmington* had been applied, it would not have meant that the prosecution would have had to lead evidence of fitness in this, and every case. The result can be seen by considering specific examples. In *Podola*, the accused was apparently sane and capable of following the proceedings when arraigned, and in order to raise the issue of unfitness, the defence would have had to introduce at least sufficient prima facie evidence to raise a reasonable doubt as to his fitness to plead. If they succeeded in overcoming this "evidential" burden, it would then have been the task of the prosecution to negative this reasonable doubt in the minds of the jury. However, in a case such as *Ley*, where the accused was completely incoherent upon arraignment, the mere appearance of the prisoner in the dock would itself constitute prima facie evidence of unfitness to plead. The same would apply when a deaf mute was placed in the dock, as in *Sharp*. In these cases the prosecution would have to show beyond a reasonable doubt that the prisoner's apparent affliction was not genuine. This does not seem to be an insurmountable burden to place on the prosecution and seems desirable, according to our general view of the justice of the situation as expressed in *Woolmington*, that a man should not be required to defend himself if there is a reasonable doubt as to his ability to do so, by virtue of his mental or physical condition. As the law stands as a result of the decision in *Podola*, if the jury do not think, that on the balance of probability the prisoner is unfit, he must be tried, even if there are reasonable grounds for doubting his ability to defend himself.

If the *Woolmington* principle had been applied to define this particular burden on the defence, it would have enabled the Court of Criminal Appeal to show that cases such as *Dyson*, where it was stated that the jury must be "satisfied" of the accused's insanity, should be reconsidered; on the ground that any pre-*Woolmington* decision on criminal burdens of proof must be carefully scrutinised, for even if *Woolmington* did not alter the law, it certainly showed that many old cases were expressed in ambiguous terms. So in *Chan Kau*, the Privy Council said that the direction in *Smith*,[23] which state that where the accused raised the defence of self-defence he must first "satisfy the jury" that such self-defence was necessary; was in need of modification "in the light of modern decisions."

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[23] (1837) 8 C. & P. 160 at 162.

In view of the nature of the alternatives, and the fact that such a question is of undoubted public importance, it seems regrettable that the Attorney-General did not see fit to grant his fiat so that the question could have been authoritively settled by the court which decided both *Woolmington* and *M'Naughten.*

The Taking of Statements from Victims and Witnesses of Sexual Offences

By Miss D. O. G. Peto

Formerly Superintendent of the Metropolitan Women Police

Not long ago, I came upon some old notes on statement-taking in connection with sexual offences against children and girls. They were based on intensive experience as a member of the Birmingham Criminal Investigation Department. I offer them, with diffidence, for consideration by such of the present generation of women police as may not yet have acquired a technique of their own.

The perfect statement is clear and concise. It starts at the beginning, gives every material fact in chronological order, and ends at the end. If the patience of the prosecuting solicitor is tried by muddled work the witness won't get a fair chance in court. If the statement-taker takes anything for granted, somebody may find himself landed on a false charge.

The obvious foundation for a perfect statement is a thorough knowledge of the rules of evidence, coupled with a grasp of the facts required to prove any particular crime or offence. To this must be added method. Only a tyro plunges into the taking of a statement before knowing just what it will contain.

Imagine a typical incident. You are called out to deal with an offence involving a small girl. Awaiting you at the police station you find mother, auntie, and one or more children. Having greeted them, you get the strength of the case from the station officer, and decide in the light of this whether a medical examination is desirable. Possibly the divisional surgeon has already been notified. If delay is likely, you examine the child's clothing yourself, in the mother's presence, for disarrangement, stains or rents. If a garment has already been removed at home, you arrange for its immediate production. You also consider the advisability of visiting the scene of the occurrence, to look for signs of a struggle, or for a missing button—or plaything. Incidentally, such a visit may help to clear up details of the story.

You will now have gathered enough of the facts to indicate whether it will be best to take the child's statement in her mother's presence or alone. Since parents are apt to prompt, the latter course is normally advisable: indeed, it is essential if the mother first learned of the affair from someone other than the child itself. In such circumstances the mother's first reaction will have been to show either anger or alarm: shame or fright will have led the child to admit as little as possible of the facts: and the whole truth will not come out so long as the mother is present.

Get corroboration for every fact which admits of it, however much additional work this involves; and take each such statement out of hearing of any other witness.

In the days when the employment of women police was still a matter of debate, I often heard it claimed on their behalf that they could, by skilful questioning, erase a distressing experience from the mind of a young witness. In due course I discovered that it is much easier to make such a claim on a platform than to substantiate it on the job. Nevertheless, by a process of trial and error, I learnt a few things which may be worth passing on.

Before taking down the actual statement the full story must be drawn from the child. If she is willing to talk, you should just sit and listen, attentive but relaxed. If it is essential to make a written note of some vital point at this stage, do it under the table on a pad placed on your knee without attracting the notice of the child. If it proves necessary to draw out the facts by questions, it is, of course, imperative that you do not lead your witness on any material point—a date, a time, a gesture. *You* know what evidence is essential to the case, but she must not! Be careful, also, so to phrase your questions as not to give unsuitable knowledge. In this connection, "dirty tricks" is a useful term. It will mean little or much according to the experience of the child. Finally, let the statement be written in the words of the child herself, however childish or uncouth.

Much patient probing may be necessary before the task is achieved: and this can be remedial as well as essential. Essential, because if you shirk some unpleasant detail you allow the witness to conclude that it is too bad to talk about, with the result that she will falter or break down in the witness-box at that very point. Remedial, because by this means you can make sure of all that is in the child's consciousness and help her to face it, so preventing its repression. Help the child out with "another little girl met a man near here who behaved queerly, and if you can tell me exactly what he did to you I shall know if it is the same man and then we can put a stop to it." Of course, to delve *below* the conscious level of the child's mind for what may have been tucked away because it is unbearable is a matter only for a trained psychologist.

If a good line on the subject has already been taken with the child by the mother or some other person, adopt it: if a bad line, undo it if you can, or modify it. "The man is mad" may terrify the child: "These men are all mad" is worse, since the child will fear that there are a lot of them in wait for her or that there are *no* decent men. Modify this to "the man is odd—abnormal—has never grown up."

Older witnesses may be helped to face the court if they understand that their evidence will help others, and that you respect them for coming forward. Look out for and reassure the modest girl who fears that it was something *she* did which induced a man indecently to expose himself to her. The analogy of a rude boy who enjoys putting out his tongue at respectable passers-by may be useful here. There are girls so inexperienced as to need reassuring as to the possible consequences to themselves of an indecent gesture or even of a caress from a strange man.

Never drop your voice when discussing distasteful details. Be ordinary and business-like. Avoid the "Ah, my dear, I'm accustomed to these things" approach which suggests that you are a sink of obscene information. This degrades the witness and does *not* reassure her.

Avoid unnecessary medical examination. If it is clear that there is no reason to suppose that the child has suffered any physical damage, and there is insufficient corroboration of the child's story for a charge to be brought, why subject her to an experience which can only add one more ordeal to what she has already undergone? If, however, medical examination is necessary, let it take place, if at all possible, in the child's own home or in the doctor's surgery rather than at the police station: and unless the mother wants the family medical man called in, let the examination be carried out by a woman doctor, so as to avoid associating it more than can be helped with the actual offence.

Implore friends and parents of young witnesses to keep off the whole subject both before and after the case is heard. Don't see them yourself more than is necessary during the investigation and keep away altogether when the proceedings are over. The less they see of you, who know all the details, the sooner these will be forgotten. If either help or guidance is needed for a child or girl, enlist the aid of a children's worker who either has not heard the whole story or has heard it unknown to the child concerned. When the case ends, ask the worker to get her away for a holiday amongst interesting surroundings till the local gossip has died down: and don't—as I did once, to my shame—call round when the child comes back again and take her to the police station to attend an identification parade.

Although the untruthful witness is a danger which must never be underestimated, it is utterly wrong to reject out of hand, on the ground that the child or girl involved is " an incorrigible liar," every case in which she is detected in a lie. The habitual liar must not be confused with the not-too-conscientious youngster who takes refuge in a lie when confronted with an embarrassing disclosure.

Take, for example, one of a little group of children, perhaps their ringleader, discovered to have been allowing the old man at the sweet-shop to behave indecently with them in return for sweets. Confronted with an angry or a horrified parent, she is likely to protest: " Momma, I never did it! " or " Momma, it only happened once! " Or the adolescent girl, discovered to be pregnant, who tries to cover her disgrace by a tale of an isolated act of intimacy, against her will, with a man unknown, until a confession is dragged out of her implicating the husband of her employer, or the smart young clerk at the office, with whom she has been associating for weeks when supposedly attending the Evening Institute. I would urge that it is precisely this type of child and young person which most needs the protection of the law; and that if the law is worth anything at all, it was framed largely to deal with this type of offender.

Towards the Deodand

By J. W. Cecil Turner

A. General Survey

1. *Early history of legal liability*

It is a commonplace in the works on English legal history that in the earliest known periods of our jurisprudence the test of legal liability for anti-social deeds such as in later times came to be described as crimes was so narrow and so strict as to seem at first sight [1] crude and absurd to modern minds. To take a few examples: we read that if at A's suggestion B accompanied him to witness a wild-beast show, or to look at a madman, and B happened to be killed by one or other of these exhibits, then A was held to carry full legal responsibility for B's death[2]; again, if A hung up his sword and B dislodged it so that in its fall it wounded C, then A had to pay C; or if A, setting out on a business journey, induced B to accompany him and while they were so engaged A's enemies fell upon them and killed B, then A had to pay for B's death. In none of such instances, says Maitland, could the man honestly swear that he did nothing that helped to bring about death or wound. Such recorded cases led Maitland to the conclusion that there was a time when a man was responsible not only for all the harm springing from his own acts but also for that done by his slaves, by his beasts, and even by the inanimate objects owned by him. "If," writes Maitland, "you hand your sword to a smith to be sharpened, see that you get it back 'sound,' that is to say, with no blood guiltiness attached to it, for otherwise you may be receiving a 'bane,' a slayer, into your house.[3]" Indeed we are told that even as late as the thirteenth century anyone accused of homicide was called upon to swear that he had done nothing whereby the dead man was "farther from life and nearer to death."[4]

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[1] For a considered view, see Winfield, " The Myth of Absolute Liability " (1926) 42 L.Q.R. 37.

In a period when such doctrines obtained there flourished also the law of *deodand*, which, as is well known, was the name given to whatever personal chattel should happen to have been the immediate cause of the death of any human being[5] which was, under the ancient law forfeited to the Crown to be applied to pious uses. The notion of attaching guilt to immediate factors is one of great antiquity[6] applying not only to animate creatures but also to inanimate objects.

In this era of strict personal liability for the consequences of any active human conduct it was accepted as a defence if the man charged with a harm could show that he had been completely inactive, that is to say, that he had not moved in the matter at all, that the "deed" was not his deed. Throughout the centuries which have followed this doctrine has been preserved.[7] It must be remembered that in that era the division of transgressions into the two separated classes of "crimes" and "torts" had not yet been achieved and the question under review for all was that of a causation which would carry legal liability. So far as the relatively minor infractions of the accepted social code, later to be termed torts, were concerned we find the same test of liability as for the more heinous deeds, later to be termed crimes; and it has continued, in appropriate circumstances, to the present day notwithstanding that the principle of the "reasonable man" has so vastly enlarged the scope of liability for the results of inaction. Thus in *Smith* v. *Stone*,[8] a case of trespass, where the defendant pleaded that he was carried on to the land by the force of other persons and was not there voluntarily, Roll J. ruled that "it is the trespass of the party that carryed the defendant upon the land and not the trespass of the defendant: as he that drives my cattle into another man's land, is the trespasser against him and not I who am the owner of the cattle."[9] In *Gibbon* v. *Pepper*[10] we find it stated "if A beats my horse, by which he runs on another, A is the trespasser, and the rider is not." Again in *Weaver* v. *Ward* in 1724,[11] a case of trespass to the person, it was stated that liability would not arise "if a man by force take my hand and strike you . . . so as it had appeared to the court that it had been inevitable."

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[2] See P. & M. II, 469.

[3] P. & M. II, 470 *et seq.*, citing *Law of Alfred*, 19, § 3, *Leg.Hen.Pr.*, 87, §§ 2, 3, and 90, § 11. See also Holdsworth, II, 51: "A man *acts* at his peril."

[4] *Leg.Hen.Pr.*, 90, § 11.

[5] "*Omnia, quae movent ad mortem, sunt Deo danda*," Bracton, 1, 3, c. 5.

[6] Aeschines, "*Contra Ctesiphon*," 244; Pausanias, I, 28, 10. See Foster, 266, "founded rather in the superstition of an age of extreme ignorance than on the principles of sound reason and true policy." Blackstone's attempts (Con., I, 300) to find some rational grounds for this superstitious rule serve only as rather lame excuses for its retention. It was, of course, abolished entirely in 1846; see Kenny, *Outlines of Criminal Law*, 17th ed., p. 8.

[7] It is the reason for what is, by some, regarded as a defect in our modern law, namely, that for the consequences of his omission to take active

In modern times (except when we have to search for the legal duty) the reply "not my act" is scarcely ever needed, since the "reasonable man" standard, which has for long past been so firmly implanted into the law of tortious liability, has engulfed and absorbed that defence; for obviously our immaculate figure, the imaginary reasonable man, when subjected to overpowering force would have been just as helpless and incapable of taking any remedial action as the actual defendant who had been thus subjected; and if so, then it follows that this defendant must succeed in the action since he cannot be held to have fallen short of the standard of conduct objectively set by the law. So also for crimes did the plea "not my act" continue in our later law, for even

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steps there is no criminal liability on a man unless the prosecution can establish that in the circumstances of the particular case he was under some special legal duty to take those steps.

[8] (1647) Sty. 65.

[9] A case which, by way of contrast, clarifies and explains the present point is *Gilbert* v. *Stone* (1647) Aleyn 35, another case of trespass. But here the plea was that the defendant went into the land because twelve armed men threatened him with death if he did not enter, and this was held to be no plea "for one cannot justify a trespass upon another for fear." The man's movement on the land was voluntary and was "his act."

[10] (1695) 2 Salk. at p. 638.

[11] Hobart, 134.

after the common law came to require *mens rea* as an ingredient in criminal liability, lawyers could still with effect and propriety argue that the harm done was not the "*act*" of the accused man. Thus in the seventeenth century Hale [12] wrote: "If there be an actual forcing of a man, as if A by force takes the arm of B and the weapon in his hand, and therewith stabs C whereof he dies, this is murder in A but B is not guilty." In modern times Lord Hewart C.J. is reported to have said in 1922: "If a man walking in his sleep do something, it is not his act at all." [13]

2. *The defence "not my act" not identical with the defence "accident"*

At this juncture it is necessary to make clear the precise meaning of the defence "not my act." It is purely a point of *causation* and is separate from (although in certain instances it may reinforce) any other defence such as denial of "*intention*," of "*carelessness*" or of "*negligence*." [14] Nor may it be equated to the defence of "*accident*." For "accident" is a generic term since it covers more than one specific situation, *e.g.* (1), Where the actor by his freely self-controlled conduct has brought about a harmful result which he neither intended nor even foresaw, *and which the "reasonable man" in the same circumstances would not have foreseen*; here his defence is "no negligence since the reasonable man would have behaved as I did," but he could also maintain with verbal propriety that what had happened was an "accident"; and (2) Where his conduct either fell short of bringing about the harmful result or was not self-controlled but compelled by some overpowering force exerted upon him by someone else; here his defence is "not my act," to which again one could add, that so far as that man is concerned the harm is an accident. To take a simple example: A innocently unlocked his wine cupboard and left it so; later B secretly added poison to the wine in a decanter which stood in the cupboard; subsequently C, the son of A, in A's absence, poured out and gave a glass of that wine to D, a visitor, who drank it and was made ill. C could escape liability by pleading "no intention" and "no negligence" and could allude to the generic defence "accident" so far as he was concerned—but he could not plead "not my act" since he did in fact cause D to drink the harmful wine. A could plead "not my act." From this it follows that a statutory provision which creates liability for a deed done "negligently, or carelessly, or accidentally" (or any two of these three adverbs) has not *thereby* ruled out the defence "not my act." For the words of the statute *could be satisfied* by taking the word "accidentally" as meaning the situation set out in (1) above. To this point we shall recur below.

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[12] 1 P.C. 434, citing Dalt. cap. 93, p. 242 (new ed., cap. 145, p. 473), and Plowd. I, 19a.

[13] *Cf.* the remarks as to a somnambulist by Stephen J. in *R.* v. *Tolson* (1889) 23 Q.B.D. at p. 127.

[14] Assuming for the moment, although not admitting, that there is a difference between the last two of these conceptions, as was suggested by Darling J. in *Ashton* v. *Eccles* (1906) 71 J.P. 55.

3. *Liability under statutory law*

So far we have been speaking of the common law. When we turn to statute we are confronted with the confused topic of rules of construction.[15] It is nowhere denied nowadays that statute, being the decree of the legislature, can and often does override the rules of the common law; but it is, I think, also not suggested that Blackstone was wrong when he stated that statutes are either *declaratory* of the common law, or *remedial* of some defects therein.[16] There are many canons of interpretation which have from time to time been enunciated by the courts but when we look into the treatises which deal with this topic we find that there is much possible conflict between the canons themselves and also conflict between the opinions of the judges as to the precise meaning of the particular canon within which counsel argues that the case before the court must fall. This tangled situation seems to have been summed up and accepted by the House of Lords [17] in the following words:

> "I do not regret . . . the fact that . . . so-called rules of construction have fallen into some disfavour. It must be recognised, however, that the courts have laid down, not indeed rigid rules but principles which have been found to afford some guidance when it is sought to ascertain the intention of Parliament."

Such a declaration seems to imply that the emphatic statements as to principles of construction uttered by the judges in past cases have been too dogmatic; and further, that the limits of judicial discretion in this branch of the law are much wider than was formerly supposed even if, indeed, they exist at all. If that be so and the "so-called rules" are merely persuasive suggestions, it remains for us to examine the decisions in modern judgments in order to discover whether any trends are to be detected towards the confirmation or repudiation, as the case may be, of the "rules" as a whole. Such a general survey [18] is outside the scope of the present article which is concerned with only three of them. Before turning to these however we must note the agreed doctrine that "where the words of an Act of Parliament are clear, there is no room for applying any of the principles of interpretation" [19]; there would seem to be no question but that this doctrine is one of binding validity.

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[15] See Edwards, "*Mens Rea* in Statutory Offences," *English Studies in Criminal Science*, Vol. VIII, for examples of conflicting decisions.

[16] 1 Com. 86.

[17] *Cutler* v. *Wandsworth Stadium, Ltd.* [1949] A.C. 398, *per* Lord du Parcq at p. 410.

4. *Some principles of interpretation*

The three principles of interpretation now to be considered are:—

(*a*) *A statute must be interpreted to conform with the common law except where and in so far as the words of the statute show plainly that it is intended to alter the course of the common law, or cannot in their plain meaning be otherwise construed.*[20] There is ample authority for this proposition as the following citations will show.

> "The general rule in exposition of all Acts of Parliament is this, that in all doubtful matters, and where the expression is in general terms, they are to receive such a construction as may be agreeable to the rules of common law, in cases of that nature; for statutes are not presumed to make any alteration in the common law, further or otherwise than the Act does expressly declare." [21]
>
> "It is argued that, according to the principle of construction to be applied to all statutes the general words of the Act are not to be construed as to alter the previous policy of the law unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched. . . . This principle of construction, as a general proposition, cannot be disputed." [22]
>
> "The word 'cause' may undoubtedly mean 'act': but it is ambiguous. . . . But, if these observations on the meaning of the word 'cause' as used in the statute should appear to savour too much of refinement and to be used in favour of a forced construction, it must be remembered that it is a sound rule to construe a

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[18] If pursued, this survey might well be linked with the search for modern trends in the judiciary's interpretation of the evidence as to matters of fact; *e.g.*, in such cases as *R.* v. *Charlson* [1955] 1 W.L.R. 317; *R.* v. *Kemp* [1957] 1 Q.B. 399; *Hill* v. *Baxter* [1958] 1 Q.B. 277; *R.* v. *Spriggs* (1958) 42 Cr.App.R. 69; *R.* v. *Jones* [1959] 1 Q.B. 291.

[19] *Crawford* v. *Universal Insurance Co.* [1936] 2 K.B., *per* Scott L.J. at p. 281.

[20] *Craies on Statute Law* (8th ed.), pp. 114, 175; Maxwell, *Interpretation of Statutes* (10th ed.), p. 82: "It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness," cited and approved by Lord Morton of Henryton in *Murugiah* v. *Jainudeen* [1955] A.C. at p. 153 (J.C.).

[21] *Arthur* v. *Bokenham* (1708) 11 Mod. 148 at 150, *per* Lord Trevor C.J.

[22] *Minet* v. *Leman* (1855) 20 Beav., *per* Romilly M.R. at p. 278.

> statute in conformity with the common law, rather than against it, except where or in so far as the statute is plainly intended to alter the cause of the common law."[23]
>
> "A general Act must not be read as repealing the common law relating to a special and particular matter unless there is something in the general Act to indicate an intention to deal with that special and particular matter."[24]
>
> "As an ordinary person, I should have asked, when it was proposed to call the wife against her husband, 'Will you shew me an Act of Parliament that definitely says you may compel her to give evidence? because since the foundations of the common law it has been recognised that that is contrary to the course of the law.'"[25]
>
> "In my opinion it is perfectly possible to give an intelligent meaning to section 42 [of the National Assistance Act, 1948] while bearing in mind to the full the prefatory words, without construing it in such a manner as would make a husband liable, for the first time in the history of the law, to maintain a wife who was either living in adultery or refusing to live in the home which he had provided. . . . It is impossible to suppose that Parliament intended this section to have any such effect."[26]
>
> "It is a well-established principle of construction that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion."[27]

The persistence and the emphasis with which this principle of construction has been judicially stated raise the presumption that even if it be not a binding rule its persuasiveness must be very strong indeed.

(*b*) *The second principle is that statutes imposing penalties should be interpreted in favour of, rather than against, the subject.*

> "I have always understood the rules to be that where there is an enactment which may entail penal consequences you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no one is brought within it who is not brought within it in express language."[28]

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[23] *R.* v. *Morris* (1867) 1 C.C.R. 90, at p. 95, *per* Byles J. rejecting the argument that the words "released from all further or other proceedings, civil or criminal, for the same cause" in s. 45 of the Offences against the Person Act, 1861, protected a prisoner now charged with manslaughter (since the complainant had since died) after a summary conviction for the assault which had thus subsequently proved fatal.

[24] *R.* v. *Bishop of Salisbury* [1901] 1 K.B. 573, at p. 579, *per* Channell J.

[25] *R.* v. *Leach* [1912] A.C. 305, at p. 311, *per* the Earl of Halsbury.

[26] *National Assistance Board* v. *Wilkinson* [1952] 2 Q.B. 648, *per* Lord Goddard C.J. at p. 659.

[27] *National Assistance Board* v. *Wilkinson*, *supra*, *per* Devlin J. at p. 661. See also *Nokes* v. *Doncaster Amal. Collieries* [1940] A.C. at pp. 1022, 1031, 1032.

[28] *Per* Wright J. in *L. C. C.* v. *Aylesbury Dairy Co.* [1898] 1 Q.B. at p. 109.

This rule was prominent and strictly applied in the days when the number of offences punishable by death was very great[29]; but it has nowadays fallen out of favour,[30] and at least the courts will not allow it to be misused to save from the operation of a penal statute a case which the language of the legislature in its simple and natural meaning seems plainly to bring within the purpose of the statute. Nonetheless it is not to be supposed that even in an era when the infection of totalitarianism permeates the world our law has entirely lost its traditional tenderness for the rights of the individual citizen when he is confronted[31] with some public body claiming to impose upon him a statutory burden which operates as a penalty. The following passage links this principle with the principle discussed in (*c*) below:

> " But if a man is punished because of an act done by another, whom he cannot reasonably be expected to influence or control, the law is engaged, not in punishing thoughtlessness or inefficacy and thereby promoting the welfare of the community, but in pouncing upon the most convenient victim. Without the authority of express words, I am not willing to conclude that Parliament can intend what would seem to the ordinary man (as plainly it seemed to the justices in this case) to be the useless and unjust infliction of a penalty. . . . I think it is a safe general principle to follow . . . that, where the punishment of an individual will not promote the observance of the law either by that individual or by others whose conduct he may reasonably be expected to influence, then, in the absence of clear and express words, such punishment is not intended."[32]

(*c*) *Statutes should so far as possible be interpreted so as not to lead to absurdity or to manifest injustice.* It is not to be supposed that any court would knowingly fail to observe this principle; yet there can be, and have been, cases in which individual judges have differed as to whether it is or is not possible to interpret otherwise statutory words which, taken at their ordinary meaning, do produce a seeming absurdity or injustice.[33] The following citations indicate the strength of the principle itself.

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[29] See Radzinowicz, *History of English Criminal Law*, I, pp. 103 *et seq*., and Best C.J. in *Fletcher* v. *Lord Sondes* (1826) 3 Bing. at p. 580.

[30] Thus, Lord Hewart C.J., in *Evans* v. *Cross* [1938] 1 K.B. at p. 698, said: " If the court were urged so to interpret the Act and the Regulations as to bring failure to observe a white line within the penal provisions of the Act because there was no other way of dealing with a case where mischief had resulted, or might have resulted, from non-observance of the line, the court might be astute to find in the words of the Act and Regulations something which would cover what had been done."

[31] *e.g.*, as in a Taxing Act. *Tennant* v. *Smith* [1892] A.C. at p. 154; *St. Aubyn* v. *Att.-Gen.* [1951] 2 All E.R. at p. 485 and [1952] A.C. at p. 32. See Maxwell, *op. cit.*, p. 238.

[32] *Per* Devlin J. in *Reynolds* v. *Austin & Sons, Ltd.* [1951] 2 K.B. at pp. 149, 150.

> "I would adopt any construction of the statute that the words will bear in order to avoid such monstrous consequences." [34]
>
> "Now, no doubt, it is possible that the legislature may have contemplated, for the protection of harbours, docks, and piers, an enactment fraught with consequences of this description; but before we attribute to it so strange a purpose, we are bound, I think, to see whether the phraseology it has used, taken altogether, does not enable us to reconcile its action with common sense and common justice. . . . We must take care that a hard case shall not make a bad law; but we must also take care that we do not attribute to Parliament the intention of injustice so very flagrant, without coercive necessity." [35]
>
> "There is a legal proverb that hard cases make bad law; but I think that there is truth in the retort that it is a bad law which makes hard cases. And I think that before deciding that the construction of the statute is such as to work this hardship, we ought to be sure that such is the construction, more especially when the hardship affects not only one individual but a whole class." [36]
>
> "Of course the mere fact that the results of applying a statute may be unjust or even absurd does not entitle this court to refuse to put it into operation. It is, however, common practice that if there are two reasonable interpretations, so far as grammar is concerned, of the words in an Act, the courts adopt that which is just, reasonable and sensible, rather than one which is, or appears to them to be, none of those things." [37]

5. *Summary of the general survey*

So far we have considered (i) the rules of liability under the common law, (ii) the common law defence "not my act" and (iii) traditional principles for the interpretation of statutes. We now proceed to examine a modern case in the light of this general survey.

(*To be continued*)

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[33] See the judges of the courts in the cases of *Donaghue* v. *Doncaster Amal. Collieries* [1939] 2 K.B. 578; [1940] A.C. 1014.

[34] *Per* Lord Kenyon C.J. in *Fowler* v. *Padget* (1798) 7 T.R. at p. 514; words adopted by Wills J. in *R.* v. *Tolson* (1889) 23 Q.B.D. 168, at p. 177.

[35] *Per* Lord O'Hagan in *River Wear Commissioners* v. *Adamson* (1877) 2 A.C. at p. 758.

[36] *Per* Lord Blackburn in *River Wear Commissioners* v. *Adamson, ubi supra,* at p. 770.

[37] *Per* Finnemore J. in *Holmes* v. *Bradfield R. D. C.* [1949] 2 K.B. at p. 8. And see *R. B. Policies* v. *Butler* [1950] 1 K.B. at p. 82.

The Protection of Documents Against Forgery

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In general, the forgery of a document is accomplished in one of two ways. The first is its complete fabrication, whilst the second involves the unobtrusive erasure or alteration of entries on an existing genuine document. Forgery has long been regarded as a serious crime and is heavily punished as a deterrent, for the rewards of a successful forgery may be high and its consequences serious. To defeat, or at any rate to discourage, forgery, the attack has been twofold. In the first place, scientific methods have been developed and special laboratories established for the exposure of forgery and the identification of the forger as a preliminary to conviction, and secondly, the resources of industry have been mobilised to render the task of the forger more difficult. The struggle between the forger in his quest for easy gain and those whose endeavour it is to produce documents such as bank notes, cheque and receipt forms which can conveniently be neither copied nor altered has a certain grim fascination. Not all the advances in technology have been to the advantage of the forces of law and order, for improvements in photography and in certain branches of the printing trade, notably the introduction of simple apparatus for photo-offset printing, have opened the way for those who lack the inborn artistic skill essential to the large-scale forger of a previous generation.

Bank notes

The successful large-scale forgery of documents such as bank notes may have disastrous effects on the strongest economy: a good reason why, during the last war, the Nazis devoted considerable effort to the large-scale forgery of the currencies of their enemies.

In view of the importance governments attach to the protection of their paper currency from attack by the forger, an examination of the modern bank note will best give some idea of the steps which can be taken to render copying of a document as near impossible as is practicable to contrive. In spite of the resources which have been mobilised, the problem has proved not easy of solution for bank notes have to be printed by the million.

This means that they must be both cheap to manufacture and capable of being reproduced by high-speed machinery; they must also be sufficiently robust to have a reasonable life in circulation.

Paper

The first line of defence against forgery is the nature of the paper on which the bank note or other valuable document is to be printed.

British bank notes (not Treasury notes) of a decade or so ago were printed on a most distinctive paper whose appearance and "handle" were quite outstanding; no other paper of commerce looked or felt anything like it. This paper was specially manufactured for printing bank notes and the whole output from the mill had to be accounted for, any scrap from the printing process being destroyed under supervision.

The same cannot be said of the paper of the contemporary bank note, which to the unitiated has an appearance and "handle" similar to that of a number of papers in commercial use. Actually, the "handle" of the paper is quite distinctive and it is fascinating to watch the ease and certainty with which an experienced bank clerk will strip out a forgery from a bundle of notes he is rapidly counting.

Watermarks

The most obvious safety feature of bank-note paper is its watermark.

Whilst the acquisition from commercial sources of paper which looks and feels very like that on which Treasury notes are printed is by no means difficult—one forger known to the author obtained quite suitable paper from among the waste odds and ends thrown out by a local paper mill—to obtain paper which is appropriately watermarked is quite another matter.

The most common type of watermark owes its enhanced translucency on examination by transmitted light to an actual thinning of the substance of the paper produced in an early stage in its manufacture. It follows from this that a genuine watermark cannot be produced after the paper has come from the machine.

As might be expected, the watermark has presented a challenge to the forger he has not been slow to meet, and various methods for simulating a watermark have been devised.

With certain papers, local consolidation by pressure is sufficient to increase translucency to such an extent as to suggest the presence of a poorly defined watermark, whilst with the majority an oiled outline of the genuine mark may be applied to the paper by placing it in firm contact with an appropriately carved wooden block smeared with just the correct amount of a suitable non-volatile oil, a process which easily lends itself to large-scale operation.

Whilst such spurious watermarks are easily exposed on laboratory examination they generally pass muster on casual inspection.

Insertions in paper

It is possible to insert threads in the substance of the paper during manufacture. A metal filament is characteristic of contemporary British bank-note paper whilst silk threads are used to protect the paper used by certain foreign governments for official documents.

The introduction of the metal filament into bank-note paper has posed a serious problem for the would-be forger, for whilst the manual insertion of a metal thread into a narrow sheet of paper may be possible it would clearly be impracticable to attempt to carry out this feat on a large scale.

Coloured paper

Paper may be coloured in a distinctive manner both to enable it to be easily recognised and to make its limitation more difficult. Instead of dyeing the paper in the mass, a small proportion of dyed fibres may be added to the undyed pulp just before it passes onto the wire of the machine. This forms a sheet with a mottled tinting apparent on viewing by transmitted light, an effect which is very difficult to simulate on a finished sheet of paper.

Printed designs

Early bank notes were printed from engraved plates embellished with elaborate delicate scroll work, the result of weeks of hand work by highly skilled craftsmen. Notes and securities carefully printed from such plates presented such a perfection of outline that only a skilled craftsman could hope to fabricate something which could confidently be expected to pass anything but casual scrutiny.

Today the availability of photographic apparatus of high precisions means that the most elaborate and delicate scroll work can accurately be copied for subsequent reproduction in quantity by anyone, even though he may lack marked artistic ability, providing he has learned a comparatively easy technique. Added to this, the marked improvement in the quality of the work of what might be termed "office printing machines" based on the photo-offset principle has meant that quite tolerable imitations of high-class letter-press printing can be made by amateur craftsmen. Anyone familiar with the genuine currency is unlikely to be deceived by such " do it yourself " efforts so some discretion must be used in their disposal. It is reported that spurious United States currency is being produced in that country for export to Canada, where it meets with a ready reception (at a slight discount) from a population not well versed in the appearance of the genuine article.

Secret printing

Advantage has been taken of the availability of colourless printing inks which fluoresce strongly in ultra-violet light to protect documents, especially those such as official passes which have to be shown on entry into restricted areas. These have to be handed in for routine examination under a mercury vapour lamp, when printed entries which are not otherwise apparent become visible. This method of protection is of limited application and loses its efficacy once the fact that it is being used has been discovered; nevertheless it is of value in that it places yet another obstacle in the path of the forger.

As yet, there is no report of the magnetic ink, recently developed to permit of the mechanisation of bank procedure and letter sorting, being used for secret printing but there appears no reason why this should not be done. The average forger would find it difficult either to obtain a supply of such ink or to prepare it for himself for little has been divulged as to its composition.

Since the multiplication of atomic piles, radio-active material with a wide range of properties has become readily available to approved organisations. The author is awaiting with some interest the introduction of documents bearing mildly radio-active coding marks thereon. This would prove a real challenge to the forger as all radio-active material is the subject of most stringent control at the source and this is one thing which *cannot* be prepared at home, however skilful and painstaking the operator.

The foregoing considerations apply largely to forgery where, in order to make any reasonable profit, a fair number of documents have to be fabricated, necessitating mass production by the aid of some form of machine. With a limited number of documents to be fabricated, the whole may be produced by hand and, on occasion, the skill and patience revealed is scarcely credible. The most intricate design seems to be taken in the forger's stride and the author has seen forged currency notes with all their intricate scroll work drawn freehand with a pen and a set of coloured inks. These particular notes escaped discovery until they reached the banks, for the workmanship was exquisite. The drawing, which must have taken many hours, was the spare-time occupation of a plasterer who was content with the weekly production of a single 10s.

note until he suddenly realised that to change over to £1 notes would double his return for the same amount of labour.

Every law-enforcement agency has its own examples of the forger's art wherein the skill and patience were worthy of a better cause. Fortunately, dishonest men with the patience and skill to produce convincing forgeries by hand are few but their existence should never be overlooked.

Protection against alteration

The alteration of an existing genuine document—generally to raise its apparent value or to remove a cancellation mark or some device such as the crossing on a cheque which limits its negotiability—is a simpler and consequently far more common type of forgery than the fabrication of a complete document. The devices which have been suggested to render alteration difficult—it is unwise to use the term " impossible "—range from the obvious to those which have taken years of research for their perfection. The scope seems unlimited, research continues apace and new devices are the subject of innumerable patents, but the forger-proof document has probably not yet appeared. The most ancient and simplest device for authenticating a single document such as a receipt—never excelled for reliability—is the irregular tearing of a single sheet, each party retaining a half-portion. The duplication of an irregular edge on a sheet of paper is certain to present the most skilful forger with an insuperable problem and it is unfortunate that the principle does not allow of its general extension to other types of documents.

Colour coding

Another protective device is the colour coding of the paper or the printing thereon. An example of this is the totalisator ticket which is coloured according to a code which prevents a winning number issued for a different race being paid in error. It is unfortunate that sweepstake tickets are not always coloured according to the numbers they bear, such as red for even and blue for odd numbers. The author has received for examination quite a number of tickets where the original number has been cunningly altered so as to win a prize which is often parted with before the genuine ticket is presented. With a simple colour code, the majority of such forgeries would have been detected immediately and much ill-feeling prevented.

Printed codes

A simple example of the measure of protection which can be afforded by printing is found on the British money order. On this, a list of maximum values is printed and, when the order is filled out, the appropriate indication is made on the list. [See Figures 1, 2, p. 109.]

A more sophisticated device is the printed design, often in the form of strokes of various widths, which is varied according to the maximum value the security can legitimately be cashed for.

Perforations

Where the maximum value of a security is indicated by words perforated in the paper, it might be thought that this device would endow the document with absolute security, but Osborn, the famous American authority, refers to a case where the forger filled in the perforations with paper pulp before tinting and glazing the reconstructed areas to match the remainder of the document, which he then proceeded to perforate by hand to correspond with its enhanced fraudulent value!

Cheque writing machines

The "raised" cheque is an example of attack on the most vulnerable part of a very common document. Where the entries indicating the amount are made in ink or on the typewriter, the value of the cheque can sometimes be considerably enhanced by the addition of but a few letters and figures.

Cheques drawn for such sums as six or eight pounds are the forger's delight for they can be increased to sixty or eighty pounds in a few seconds. Where a typewriter has been used or the signatory uses a script form of handwriting, the forgery may go undetected even upon laboratory investigation.

Many large organisations use specially designed typewriters for filling out the cheques they issue. The typefaces which print the amounts are traversed in manufacture by sharp edged cuts, a process known as "shredding." This ensures that the indelible ink used with these machines is driven into the substance of the paper. As the dyestuff used in these inks has a marked tendency to diffuse into the paper—known as "striking"—the net result is that the typewritten characters are so heavily incorporated into the paper that erasure would call for the removal of much of the substance of the sheet. [See Figures 5, 6, p. 110.]

The entries on the cheque can be flanked with ornamental characters which make fraudulent additions to the amounts they stand for virtually impossible.

Whilst the invention of the cheque writing machine might seem to be the complete answer to the problem of the raised cheque, the occasional forger is encountered who is capable of

" raising " cheques filled out on such machines, especially when the operator has failed to take all the precautions suggested by the manufacturers.

Machines have also been devised for " signing " cheques and their makers maintain that the mechanically produced " signature " is far more difficult to forge than the average manually written signature.

Safety paper

Erasures of ink writing by abrasion or the action of chemical solutions may be carried out with relative impunity on coarse-surfaced paper of decidedly yellow tint. It is unfortunate that material of this description is favoured for the production of certain official documents such as motor-vehicle registration books, which are often fraudulently altered to facilitate the sale of stolen cars. On some papers, even laboratory examination may fail to reveal the site of an erasure although it is felt that few erasures on even the worst paper are likely to escape discovery if the document is treated with a special powder recently developed by the author for this purpose. See Figures 9, 10, 11.

A skilful forger is able to effect an unobtrusive erasure on even the whitest glossy surfaced paper, a fact which has led to the development of what are optimistically termed " safety " papers.

A quite satisfactory safety paper is formed when a coloured base is thinly covered with a layer of white fibre. The theory is that any tampering such as abrasure or the application of chemical solutions will affect the continuity of the thin white surface and reveal the colour base at the side of the erasure. While tolerably effective, such paper is difficult to make and consequently expensive.

Safety colouring

A real advance was made when the surface of ordinary paper was delicately tinted with a dyestuff which would be removed by abrasion or bleached by the application of ink-eradicating chemicals.

The resourceful forger soon found the answer to this safety tinting for after he had made his erasures and alterations, he carefully retinted the damaged areas. Whilst such delicate hand work is not expected to stand up to microscopic examination, it will often pass casual inspection.

An improved form of safety colouring which is characteristic of most contemporary British bank cheques takes the form of a pattern of fine lines or printed words such as the name of the bank rather than overall tinting. [See Figures 12, 13, p. 112.]

The restoration of the pattern is a far more exacting task than the wholesale retinting of an area, but even here the forger has risen to problems presented by this device. The American F.B.I. were concerned in a case where a forger had fabricated a forged document and had covered the whole of its surface with a hand-drawn copy of the appropriate safety pattern. When it is realised that most persons with normal eyesight require a magnifying glass to be able to read the words which make up the usual safety printing, some idea of the magnitude of the task may be achieved.

Whilst safety printing may be relied upon to expose erasures made by what might be termed the amateur forger, the presence of intact safety printing at the site of an entry should never be taken to mean that no erasure has been effected. Many printers seem to be unaware of the function of safety printing and seem to regard it merely as a peculiar form of embellishment. Instead of using fugitive inks which are immediately affected by the application of water or chemicals they go to the other extreme and use inks designed to stand up to any treatment which falls short of destroying the paper to which it is applied.

Many motor-vehicle registration books are printed on the coarse yellow paper referred to above with very resistant inks; the author has examined a number where powerful chemical ink eradicators have been applied to effect erasure of the ink entries without the slightest effect on the so-called safety printing. As yet, he has not found any cheques issued by the banks where the same stupid mistake has been made. [See Figure 13, p. 112.]

In the most highly developed safety paper, conventional safety printing is combined with another feature which becomes apparent only when the forger applies his chemical bleach to the ink-written entries. Upon the area treated with the bleach, the word " void " suddenly makes its appearance in an uncompromising black tint which the most powerful bleach leaves unaffected. [See Figure 7, p. 110.]

Encapsulation

A marked degree of protection against the alteration of particulars or the substitution of photographs on documents such as passes is afforded by encapsulation of the completed document between sheets of transparent plastic. The pressure required for encapsulation is applied by heated metal plates on which an elaborate pattern has been engraved. This pattern is transferred to the outer surface of the plastic so that any attempt at interference with the enclosed document would be revealed by the consequent distortion of the impressed pattern.

Authentication by stamps and seals

Documents are often authenticated by the application of an official mark or seal; the post office date-stamp is familiar to all. Such stamping constitutes poor protection for the marks can usually be easily copied. One of the most successful efforts of the many examined by the author in the course of his official duties was done freehand using nothing other than a pin and piece of burned cork. [See Figures 3, 8, pp. 109, 110.]

An embossed stamp is slightly more difficult to forge but presents few problems to the well-equipped operator.

In view of the ease with which the conventional official stamps can be copied, a special method of authentication is used for ballot papers for both municipal and general elections. Before being issued, the printed ballot paper is perforated in a press. The arrangement of certain of the pins in the die can be altered and the presses are secretly adjusted just before polling day. Whilst it is possible to copy a perforated mark, it is a process which demands a considerable degree of preparation of the necessary apparatus. The poll is certain to be over before forged ballot papers can be prepared.

Precautions against the re-use of documents

The simplest is the use of a cancellation stamp which is often combined with figures or letters giving the date or the place of cancellation. The most familiar is the post office date-stamp used on postage stamps.

A great deal of research has gone into the production of an efficient cancelling ink. Not only must a suitable fluid possess properties which enable it to be used efficiently on date-stamps and in cancelling machines but the ink must defy removal from the cancelled document. Most cancelling inks are black due to their content of finely divided carbon, a pigment which defies attack by chemical reagents which bleach ordinary ink. The most susceptible component of the ink is the medium which holds the pigment and it is this which the forger attacks so that he can wash away the carbon. Efforts have been made to improve the medium but more resistant cancelling inks could probably be made from aqueous solutions of certain recently invented organic compounds of copper. A step in this direction in connection with writing inks has been the use of a derivative of copper phthalocyanine as the colouring matter of the jade green "Superchrome" quick-drying alkaline ink. Experiments by the author have shown that entries with this ink defy erasure by the most powerful bleaches it is practicable to apply to paper. It is unfortunate that progress in the evolution of writing materials has sometimes been of value to the forger. A generation or so ago, entries on important documents were invariably made with an ink containing a sufficiently high concentration of iron salts to render the writing proof against premature fading and all but the most drastic abrasion or powerful bleach. Nowadays, this old rather corrosive iron-containing ink has fallen from favour, having largely been superseded by dilute aqueous solutions of aniline dyes—the so-called "fountain pen" inks. Practically all of these writing fluids can easily be bleached and some can be washed from the paper by the application of water alone.

Of even more advantage to the forger has been the popularisation of the ball-point pen. The author never hesitates to use one of these ingenious implements for a number of purposes for which they are admirably suited, but *NEVER* for signing important documents. There are good reasons for this and those interested can consult an article he wrote on the ball-point pen for an earlier issue of this journal ([1955] Crim.L.R. 544).

The foregoing account of the steps which have been taken to protect documents from the attentions of the forger makes no claim to be exhaustive but as the most carefully designed scheme of protection demands something of its user, it may make the path of the forger a little more difficult to follow if the devices designed to thwart him become more widey publicised.

GUIDE TO ILLUSTRATIONS *

Figure 1

A money order illustrating the method of indicating the maximum value by date-stamping the appropriate circle. The safety printing is in the form of fine lines. The figures in the blank circles are part of the coding system to indicate the issuing office during the process of accounting.

Figure 2

A postal order showing safety printing in the form of the words "postal draft" together with a printed limit "under ten pounds" and a stamped limit "under two pounds." The stamp of the issuing office is used for authentication.

Figure 3

The impression of a metal stamp purchased through the trade before modification for use in "authenticating" the forged deposit on a Post Office Savings Bank book shown in Figure 4.

Figure 4

A Post Office Savings Bank book with two genuine entries for small sums together with a fraudulent entry showing a large deposit

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* Figures 5, 6 and 7 by courtesy of the Todd Co., Rochester, U.S.A., reprinted from *Suspect Documents—Their Scientific Examination* by Wilson R. Harrison, M.SC., PH.D.

"authenticated" by a forged stamp modified from that illustrated in Figure 3.

Figure 5
An impression made by a cheque-writing machine showing the bold distinctive figuring which is easy to read and which cannot easily be altered, together with the ragged outline of the characters caused by the "shredded" type faces.

Figure 6
The reverse of the sheet shown in Figure 5. The "shredding" of the type faces combined with the "striking" of the dyestuff in the ink has caused the characters to be imprinted through the sheet.

Figure 7
An example of safety printing in the form of a pattern. When ink eradicator is applied the word "void" appears in the bleached area.

Figure 8
An example of a forged first-day cover. The design of the date-stamp used to "authenticate" the cover is that characteristic of a cancelling machine. The irregular siting of the three stamps showed that they were applied by hand and consequently forged.

Figure 9
The envelope used in an attempt to swindle a bookmaker. The dark patch caused by the application of graphite shows that the address had been written over the site of an erasure. The erased entry was the name and address of the punter written in pencil. When the early post-mark was obtained, the original address was erased and the present version written in ink. The use of graphite leaves much to be desired and consequently it has been superseded by an improved erasure-detecting powder.

Figure 10
An Ultra-Violet photograph of an erasure where the envelope has been treated with a recently developed powder which fluoresces vividly at the site of an abraded area but does not disfigure the document.

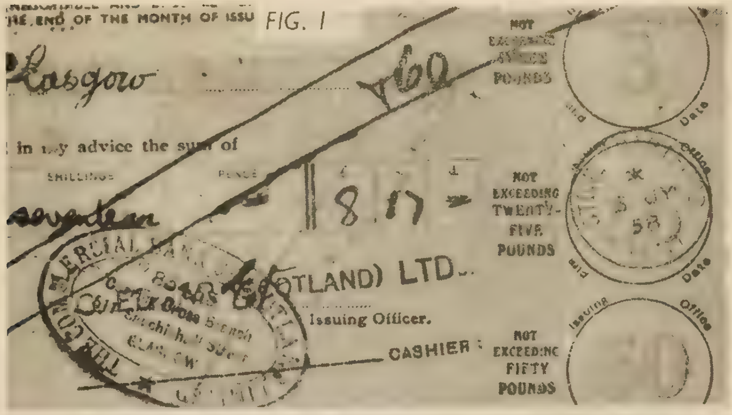
Figure 11
The use of the powder, referred to in connection with Figure 10, causes no apparent change in the appearance of the document. Contrast the appearance in Figure 9 where graphite has been applied.

Figure 12
An enlarged photograph of safety printing which has been unaffected by the use of a chemical ink eradicator. See also Figure 14.

Figure 13
An enlarged photograph of safety printing affected by the erasure which has been accomplished.

Figure 14
An Infra-Red photograph of the entry shown in Figure 12. Traces of the original entry can be seen, which proves that in spite of the undamaged safety printing shown in Figure 12, an erasure had been effected.

FIG. 1



THE END OF THE MONTH OF ISSU

Glasgow £60

NOT EXCEEDING POUNDS

in my advice the sum of

SHILLINGS PENCE

seventeen 8.17.-

NOT EXCEEDING TWENTY-FIVE POUNDS

(SCOTLAND) LTD.

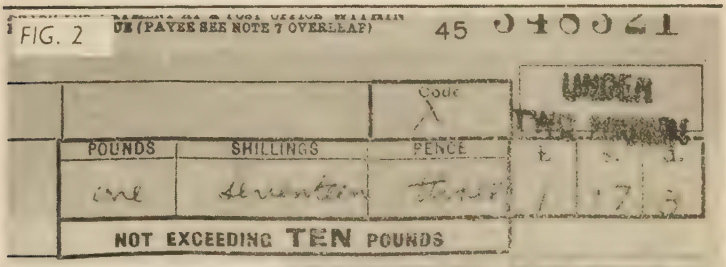
Issuing Officer.

CASHIER

NOT EXCEEDING FIFTY POUNDS

Issuing Office Date

FIG. 2

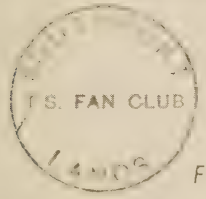


(PAYEE SEE NOTE 7 OVERLEAF) 45

	Code	
POUNDS	SHILLINGS	PENCE
one	seventeen	three
NOT EXCEEDING TEN POUNDS		

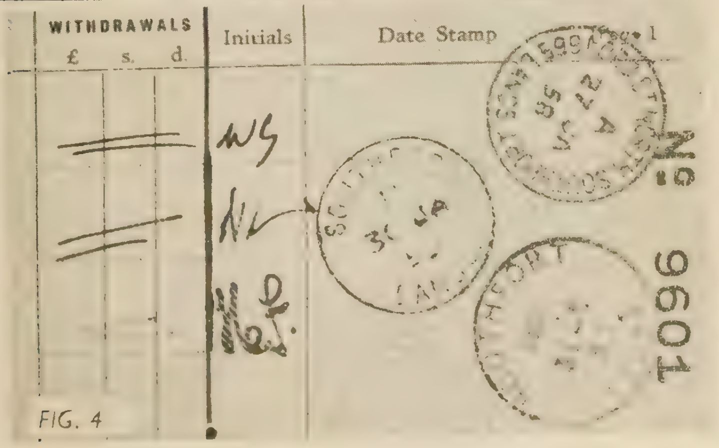
ERRINGTON,
Accountant General,

ISSUING OFFICE STAMP



S. FAN CLUB

FIG. 3



WITHDRAWALS £ s. d.	Initials	Date Stamp

Page 1

1096

FIG. 4

FIG. 5

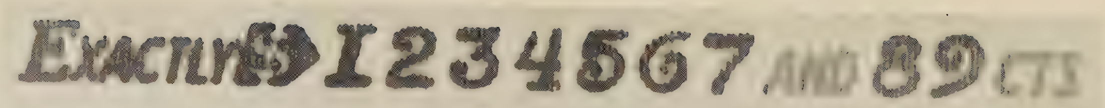

EXACTLY 1234567 AND 89 CTS

FIG. 6

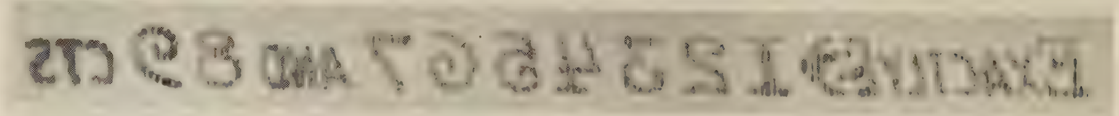


FIG. 7

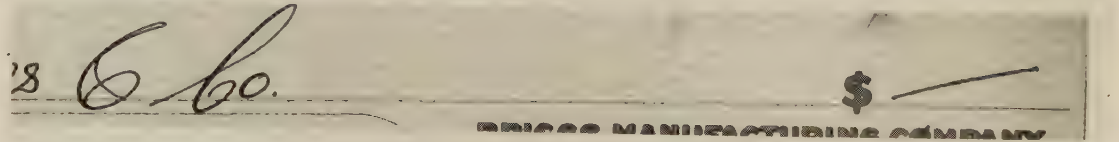
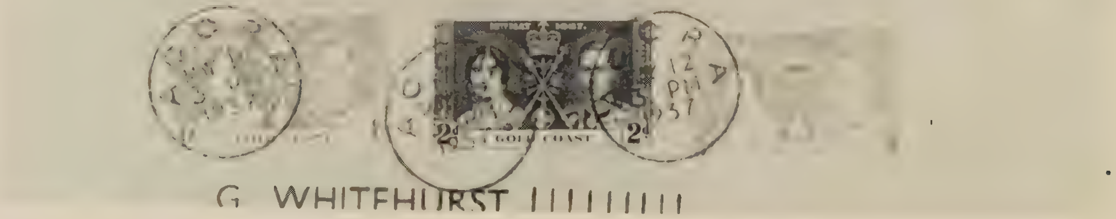
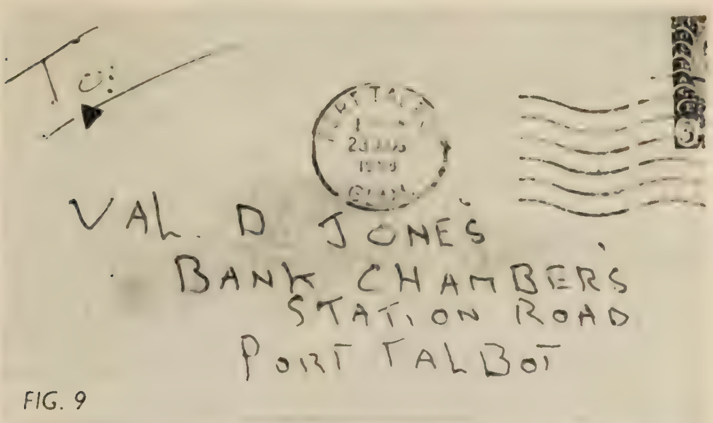


FIG. 8

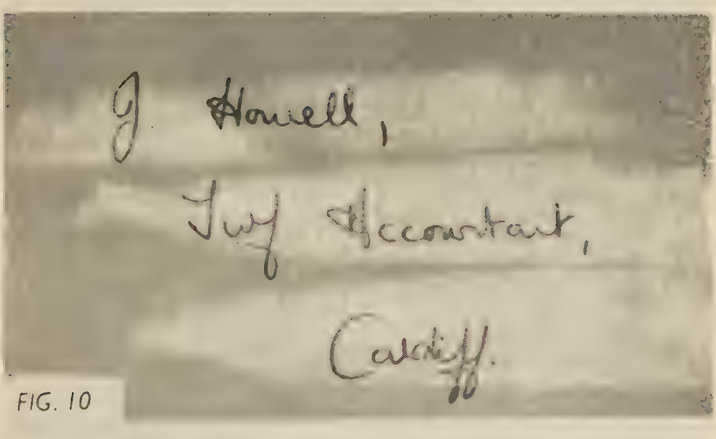

12 PM 57
2d
GOLD COAST
2d
G. WHITEHURST



To:

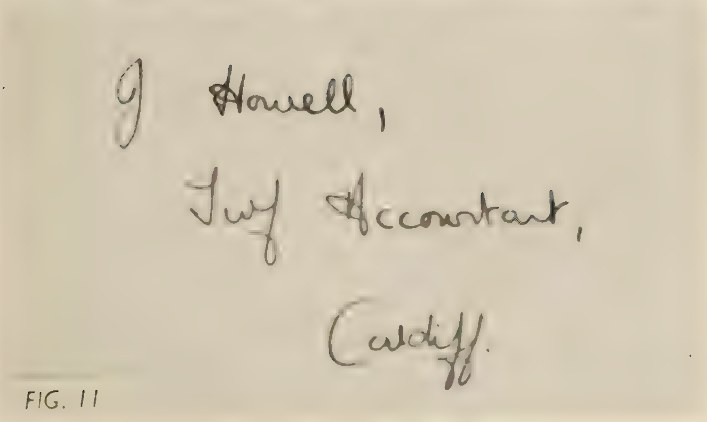
VAL. D. JONES
BANK CHAMBERS
STATION ROAD
PORT TALBOT

FIG. 9



J. Howell,
Turf Accountant,
Cardiff.

FIG. 10



J. Howell,
Turf Accountant,
Cardiff.

FIG. 11

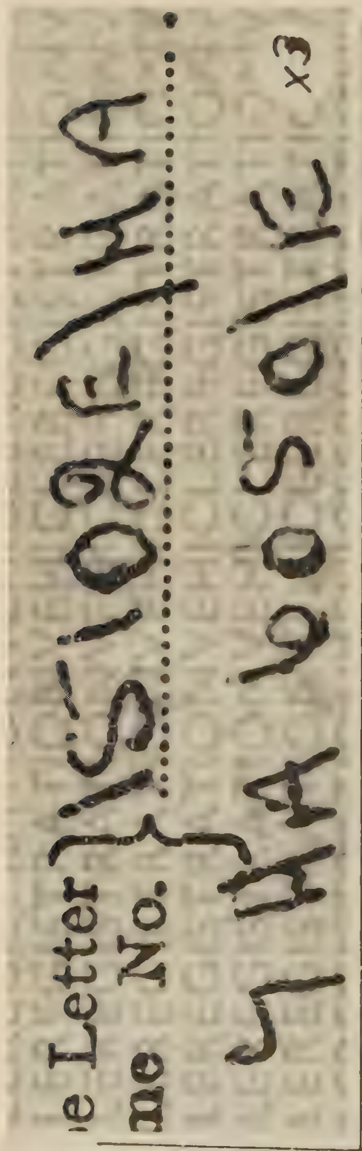

Letter
No.
x3

FIG. 12

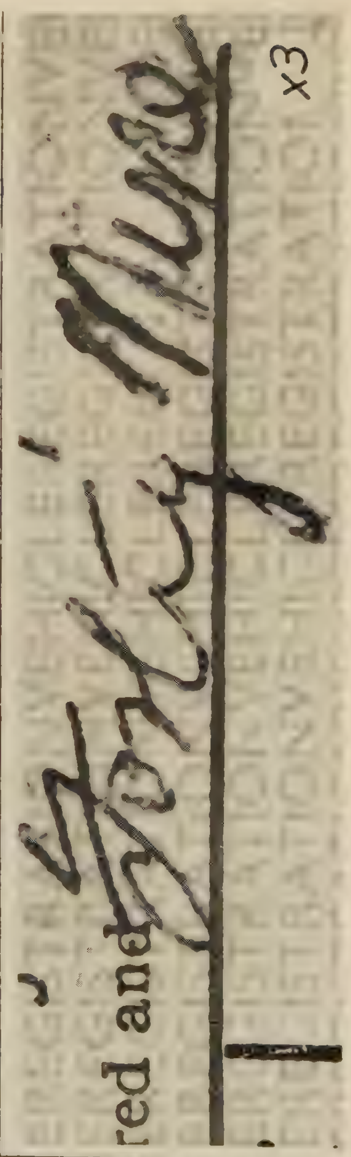
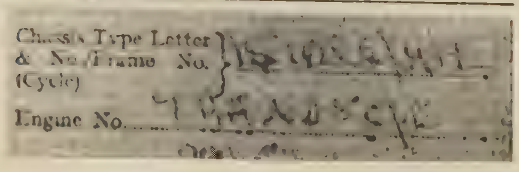


FIG. 13



Chassis Type Letter & No./Frame No. (Cycle)

Engine No.

FIG. 14

Practice and Procedure

Recognisances

Binding over to return to Eire

Since the publication of the excellent article by Mr. A. J. Chislett in the November 1958, issue ([1958] Crim.L.R. 734) Holland Quarter Sessions have " deported " two Irish people in this novel way and I thought it might be useful to draw attention to certain problems which inevitably arise.

One person sent back to Eire by the Appeal Committee was a woman who, having pleaded guilty at petty sessions, was sent to quarter sessions for sentence in the obvious hope that the higher court would send her home in this fashion. She had not the sort of criminal record which is usual in a committal for sentence. The other was an Irishman tried on indictment for misdemeanour and found guilty by the verdict of a jury after pleading not guilty.

In both cases after the court had intimated that they proposed to bind the prisoner over with this particular condition I advised that the recognisance should be to come up for judgment rather than to keep the peace and be of good behaviour. (See Mr. Chislett's article.)

The principal problems were to ascertain who should act as escort to the port of embarkation and who should pay the cost of the escort and of the fare to Ireland. Subsidiary problems were the status of the person bound over until embarkation (was he or she in any sort of custody?), and the cost of subsistence until the journey to Eire could be organised. In the man's case it occurred afterwards to the Deputy Chairman that the binding over virtually deprived the principal of the right to apply to the Court of Criminal Appeal for leave to appeal against the conviction.

The pronouncement of Lord Goddard C.J. in *R.* v. *McCartan* ([1958] Crim.L.R. 614) naturally encouraged magistrates to use this procedure to deal with the very few undesirable Irish folk with criminal records who come before English courts. With the greatest respect I doubt whether the Court of Criminal Appeal heard argument about the administrative and other difficulties involved.

In anticipation of the possible decision of the Appeal Committee to send the Irishwoman back to Eire I tried to find out who would pay the expenses involved. I consulted the Home Office who replied in the following terms:

> " I am afraid this is not a matter on which we can give any firm advice, or even have much information. As you say, the court

> has no power to order payment of a fare in these circumstances out of public funds. We understand that in some cases where a court has bound an offender over with a condition of returning to Ireland, the National Assistance Board have been prepared to issue a travel warrant, and pay a subsistence allowance, as 'assistance to meet exceptional need.' Sometimes, we understand, they have considered it necessary, before issuing a warrant or making a payment, to examine the circumstances of the case—*e.g.*, the offender's wishes, resources, and the consequences of his return on any dependants he may have in this country. You may find that an informal word with your local officer may prove helpful, but I am afraid I am unable to say whether he would be likely to feel able to consider a case in advance of a court order."

The National Assistance Board were approached but refused to help. The court made the expected order and had to rely on the probation officers to make the necessary arrangements, act as escort to the port of embarkation and arrange for payment. As usual the probation service rose to the occasion and all went well. The whole of the cost, including the fare to Eire was obtained from the poor box of the committing magistrates and with that court's express sanction.

When quarter sessions decided to bind the male prisoner over to return to Eire the probation service again came to the rescue. A probation officer acted as escort. His travelling and subsistence for the journey to Holyhead were charged to the Probation Committee but the principal's fare to Eire was a generous private and anonymous gift.

Now though all this worked very satisfactorily these Irish people were not put on probation and there was no logical reason for the probation officers to act as escorts or for any part of the cost to fall on that service. Who should act as escort? Who should pay? The police in this county have a sum available every year for the transport of prisoners and are willing to use it and to provide an escort if the court so orders. These people are not, however, prisoners and it may not be desirable to ask the police to keep them in custody while arrangements are made for the long journey and during the journey to the port. The making of the arrangements could last for several days. Fortunately, the two cases mentioned above did not cause this particular difficulty as the court sittings happened by chance to coincide with ship sailings.

When one thinks of the number of things which could go wrong before the principal is safely on board ship one is filled with apprehension.

Finally, there is the question of the right of appeal. An Irishman who is tried and found guilty may wish to appeal against his conviction on any of the ordinary grounds even if he consented in court to be bound over. If he is unceremoniously whisked out of the country how does he set about the quashing of his conviction? He cannot land in England within the specified time without being brought up for judgment. Theoretically he can instruct legal advisers by post but to argue this is surely casuistry. The fact that appeals are unlikely is no reason for avoiding the issue.

I think that courts must consider these problems before " deporting " Irish people in this fashion. With the goodwill and understanding of the Chief Constable, the Probation Service and the District Auditor all may go well, but it is obviously desirable that some more formal and authoritative procedure should be laid down. It must be totally wrong to rely on a court poor box or private charity for the enforcement of the condition of the recognisance. I think that the procedure should be governed by statute. The officers of the court and of the police are only too willing to try to find a way to execute the court's orders but they should not have to exercise too much ingenuity in matters involving the liberty of people and the expenditure of public money. It may be that the National Assistance Board will come more prominently into the picture in the future; the financial problem is not, however, the only one.

The following is a suggested condition for this type of recognisance.

The Condition

The Condition of the above recognisance is such that if the Principal shall accompany an escort to the train boat or aeroplane where he will be sent to Eire this day or as soon as arrangements can be made and if the Principal shall not land again in Great Britain for at least Years and shall appear before the Court of Quarter Sessions in the said County when called on to be further dealt with for the offence namely
of which the Principal has this day been convicted at any time during the period of Years now next ensuing then the said recognisance shall be void but otherwise shall remain in full force.

[H. A. H. WALTER, M.A., LL.B.(CANTAB.), *Clerk of the Peace for the Parts of Holland, Lincolnshire.*]

Case and Comment *

CONSPIRACY

Conspiracy to defeat the course of justice—misprision of felony

R. v. Wilde, Ward, Wooley, Morrey and Copley

Leeds Assizes: Slade J.: December 7, 8, 9, 10, 11, 14, 1959.[1]

The defendants were respectively the president, the two vice-presidents, the secretary and the buyer and manager of the grocery department of the Barnsley British Co-operative Society, Ltd. They were charged with conspiring to prevent or defeat the due course of public justice, the particulars of the offence being that on divers dates they " conspired together to prevent or defeat the course of public justice by concealing their knowledge of and by refraining from informing the police authorities of the commission of certain criminal offences of larceny as servant, embezzlement and falsification of accounts, which they knew had been committed by one Margery Ann Woodcock on divers dates in the year 1958."

Margery W., an eighteen-year-old girl, who was an assistant at a branch shop of the B.B.C.S., was discovered by the branch manager to have been stealing money or goods from the shop. Her method was apparently to fill in the top copy of the check for the correct price of the goods and later complete the carbon copy, inserting a much smaller sum. She then extracted the difference from the till. The matter was reported to Copley, who suspended her. At an interview with him she signed a statement in which she admitted doing this for about a year in respect of goods supplied to her mother and her aunts Mrs. D. and Mrs. V., and said that they knew what she was doing and had shared in the proceeds. All three vigorously denied that they had any knowledge of the thefts or that they had received any money, and the girl said in the witness-box that her statement was untrue in this respect. Copley estimated that Mrs. W., Mrs. D. and Mrs. V. had benefited to the extent of approximately £100, £94 and £64 respectively, and requested that these sums should be repaid to the Society. All the defendants read the statement of Margery W., and at a meeting on December 13, 1958, at which all five defendants were present, Mr. and Mrs. W., Mrs. D. and Mr. V. were informed that if those sums were not paid to the Society within five days the directors would have to consider reporting the matter to the police. The sums demanded were paid to the Society and no report was made by any of the defendants to the police.

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* Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For the Crown: *Rudolph Lyons, Q.C.*, and *H. C. Scott* (instructed by the Director of Public Prosecutions). For the defendants: *P. Stanley Price, Q.C.*, and *J. McLusky* (instructed by W. Winter, Barnsley).

Before the defendants pleaded to the indictment counsel for the defence moved to quash the indictment on the ground that the particulars of offence did not allege the commission of any offence known to the law. All that was alleged were two acts of omission, and it was not an offence, indeed citizens were fully entitled, to conceal their knowledge, or refrain from informing the police of some criminal matter. To say nothing about things about which one might know was not a criminal offence. There was no allegation here of any benefit to the defendants, and this it was submitted was an essential part of misprision of felony (citing Lord Westbury in *Williams* v. *Bayley* (1866) L.R. 1 H.L. 200, 220; *R.* v. *Aberg* [1948] 2 K.B. 173), even if that offence still existed and was not completely obsolete (*cf.* Halsbury, 3rd ed., Vol. 10, p. 603, para. 1201). Furthermore it was not alleged that the defendants had in any way concealed evidence, but merely that they were concealing their own knowledge. If it were to be suggested that misprision was merely the failure to report to the police any felony, if one were to go home and see a fifteen-year-old boy leaving one's garden with some windfalls from one's apple tree, one would be committing a criminal offence if one did not report him to the police. This would be putting a quite ridiculous burden on members of the public. There was no allegation of any agreement with any person who might have been prosecuted.

For the prosecution it was conceded that it was not alleged that the defendants had benefited in any way from the offence. If they had, the offence might be compounding a felony. All that was being alleged here was that they had agreed amongst themselves to commit an unlawful act, namely misprision of felony, for which it was not necessary to prove benefit to the defendants.

(In addition to those already mentioned the following authorities were considered: *Ward* v. *Lloyd* (1843) 6 Mann. & G. 785; *Flower* v. *Sadler* (1882) 10 Q.B.D. 572; *R.* v. *Sharpe and Stringer* (1938) 26 Cr.App.R. 122; *D. P. P.* v. *Kent and Sussex Contractors, Ltd.* [1944] K.B. 146; *R.* v. *Hosking* (noted at [1955] Crim.L.R. 291); *R.* v. *Crimmins* [1959] V.R. 270 (noted at [1959] Crim.L.R. 756–757); Hawkins's *Pleas*, Vol. 1, Chaps. 7 and 59; Stephen, *Digest*, Art. 209; and other textbooks, and the articles by Professor Morris and Mr. C. Howard at [1955] Crim.L.R. 291 and [1959] Crim.L.R. 750 respectively.)

Slade J. rejected the motion. It had been said that misprision of felony was regarded as obsolete. He was satisfied that it was still a common law misdemeanour. *A fortiori* a combination between two or more persons to commit misprision was a criminal offence.

Alternatively, even if he were wrong in that, a conspiracy to do any unlawful act was a crime, even if the act were not itself a crime. The subject was under a public duty not to conceal knowledge of a criminal offence and he held as a matter of law that an agreement by two or more persons to conceal their knowledge of an offence was itself a criminal offence.

The nature of misprision of felony was further discussed between counsel and Slade J. both at the close of the prosecution case and at the conclusion of the evidence for the defence. Before counsel addressed the jury Slade J. indicated to them the direction in law which he would give to the jury. He observed that all the textbooks were in agreement that the offence was vague in the extreme and that some qualification was necessary so as to exclude such circumstances as counsel for the defendants had suggested might constitute misprision and embody the *de minimis* rule. He had come to the conclusion that the qualification was not that of benefit to the defendant: the observations of Lord Westbury in *Williams* v. *Bayley* were purely *obiter*. He proposed to define misprision in modern terms as the concealment of knowledge of the commission of a felony which a reasonable person would regard as sufficiently serious to report to the police.

Slade J. directed the jury that the only crime with which they need concern themselves was larceny as a servant. He propounded four questions for them to answer in order to assist them to arrive at a correct verdict. They should only convict if they answered each of the four questions in the affirmative.

Has the prosecution proved beyond reasonable doubt—

(1) That on or before December 13, 1958, Margery Woodcock was guilty of stealing (a felony)?

(2) That on or before December 13, 1958, each of the defendants knew Margery Woodcock had been guilty of stealing, *i.e.*, knew of or believed in the existence of facts which would make her a thief?

(3) That the nature and extent of her thefts as known to the

defendants was such that a reasonable man would consider it his duty to inform the proper authorities, *i.e.*, the police?

(4) That all the defendants or two or more, and if so, which of them, agreed to conceal their knowledge from the proper authorities?

Slade J. observed that the girl's statement amounted to a confession that for a year she had conspired with her mother and two aunts to being party with them to stealing either the Society's goods or its moneys, and that all five defendants had stated on oath that they believed it to be substantially true.

The jury found all five defendants guilty.

Slade J. granted each an absolute discharge.

[JOHN M. COLLINS, *Barrister-at-Law.*]

Commentary. " Misprision of felony is an offence which is described in the books, but which has been generally regarded nowadays as obsolete or fallen into desuetude ": *per* Lord Goddard C.J. in *R.* v. *Aberg* (1948) 32 Cr.App.R. 144, 146. According to Kenny, *Outlines of Criminal Law* (16th ed.), 373, " For many years before 1948 prosecutions for it had been unknown "; and Dr. Glanville Williams says that " whatever the law may be, it is not the custom to prosecute for misprision of felony, even where a person who knows of a felony is questioned by the police and refuses to make a statement." (*The Criminal Law*, 236 (1953).)

It was suggested by Lord Goddard in *Aberg* that (adopting the language of Lord Westbury in *Williams* v. *Bayley* (1866) L.R. 1 H.L. 200, 220) misprision is " a case where a man, instead of performing his public duty and giving information to the public authorities of a crime that he was aware of, concealed his knowledge, and further *converted it into a source of emolument to himself.*" This suggestion was adopted by a New South Wales judge, Stephen J., in *R.* v. *Hosking* [1955] Crim.L.R. 291 but rejected by the Supreme Court of Victoria in *R.* v. *Crimmins* [1959] V.R. 270. These cases are considered by Mr. C. Howard [1959] Crim.L.R. 750.

The present case seems to have been argued and decided on the assumption that there was no benefit, direct or indirect, to the accused. The case is, therefore, an authoritative decision that no benefit to the accused is necessary on a charge of misprision. The limitation that the felony must be one which a reasonable person would ~~regard as suffi~~ciently serious ~~to report~~ to the police is not to be found in any previous authority and, indeed, seems to go some way towards implementing a suggestion for reform made by the Criminal Law Commissioners of 1840 that " there is reason for limiting the law against misprisions to the concealment of such crimes as are of an aggravated complexion." (5th Rep. *Parl.Pap.* XX 36; quoted by Glanville Williams, *op. cit.*)

If misprision is to be resurrected it would certainly seem desirable that there should be some limitation, but it may be doubted whether the direction in the present case goes far enough. Certainly it would seem from recent newspaper reports that it is the practice of some trade unions to take no action concerning felonies which a reasonable person could hardly fail to regard as " sufficiently serious to report to the police." It may well be that the practice of banks, and of many employers in relation to crimes committed by employees and of schools and universities in relation to crimes committed by pupils, would amount to misprision by this test.

It is respectfully submitted that the rejected test of benefit to the accused provides the most satisfactory way of approaching the problem. It is thought, moreover, that there should have been no difficulty in finding such a benefit in the present case. The accused used the threat of prosecution as a bargaining counter to procure something they wanted—the repayment of the stolen money to the Society. Leaving aside the illegality of the transaction for the moment, such a repayment would most certainly be a sufficient benefit in the law of contract to amount to consideration. If the accused had made no threat but had merely dismissed W. and made no report to the police, the case would then have differed in no way from many others in which no prosecution is brought and it may be doubted if any action would have been taken in the present case.

If the only cases in which it is thought desirable to prosecute are those in which the accused has bargained for some benefit, is it not desirable that the law should be brought into line with practice and the suggestion of Goddard L.C.J. in *Aberg* adopted?

The way is left open for a judge dealing with a charge of misprision in a future case to distinguish the present decision; for the charge in the present case was conspiracy and not misprision and, as Slade J. pointed out, an agreement to commit an act, which is unlawful but not criminal, may amount to a criminal conspiracy. It may therefore be said that it was not necessary for Slade J. to decide whether the omission to report amounted to the crime of misprision.

The case is one in which it would have been desirable to have the ruling of the Court of Criminal Appeal or the House of Lords; but it is understood that, in view of the sentence of absolute discharge, there will be no appeal.

COSTS

Award of costs against prosecution—no reflection on conduct of prosecution

R. v. Sansbury

Somerset Autumn Assize: Devlin J.: [1959] 1 W.L.R. 1091.[2]

The accused was charged on indictment with causing death by dangerous driving, contrary to section 8 of the Road Traffic Act, 1956. The charge arose out of a collision between a motor-car, driven by the accused, and a motor-cycle, being ridden by the deceased in the opposite direction to the car. At the trial it was sought to prove that at the time of the collision the accused was on his wrong side of the road. The prosecution, however, was unable to adduce any reliable evidence showing that the accused was in fact driving on his wrong side of the road at the time of the collision. The jury returned a verdict of Not Guilty without hearing any evidence for the defence.

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[2] For the Crown: *L. Herrick Collins* (instructed by Fryer, Bennett & Deal, Weston-Super-Mare). For the accused: *N. J. Skelhorn, Q.C.*, and *F. Cyril Williams* (instructed by Wansbroughs, Robinson, Tayler and Taylor, Bristol).

Held, that the costs of the accused's defence costs should be paid out of local funds.

Per Devlin J.: "I think it has now been made quite clear that the notion, which was very generally entertained, that an award of costs against the prosecution necessarily involved some reflection on the conduct of the prosecution or on the propriety of its being brought is quite wrong." [D. C.]

Commentary. The present case follows the Practice Direction given by the Lord Chief Justice in the Court of Criminal Appeal on October 19, 1959: [1959] 1 W.L.R. 1090; [1959] Crim.L.R. 838. Two subsidiary points of principle emerge. (1) The fact that the accused may, on the facts alleged, be guilty of some crime other than that charged (in this case, careless driving) is irrelevant. (2) Any "shortcomings" in the presentation of the prosecution's case are to be ignored unless they add to the burden of the costs.

CUSTOMS AND EXCISE

Penalties—purchase of duty-free imports from American servicemen

Schneider v. Dawson

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Ashworth and Hinchcliffe JJ.: [1959] 3 W.L.R. 960.[3]

An American serviceman sold to an English civilian cigars and spirits which had been imported into England, free of duty, for the use of United States servicemen. The civilian kept the cigars and spirits for his own use. Later the civilian wished to buy a further supply of cigars, and met an American serviceman by appointment. This serviceman had 2,420 cigars in his possession. They had been imported free of duty. The serviceman told the civilian that he intended to sell the cigars, and asked the civilian to look after them. It was arranged that the civilian should extract as many of the cigars as he wished. The civilian took charge of the cigars and later extracted 100 for his own purposes.

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[3] For the civilian: *John Hall* (instructed by Judge & Priestley). For the respondent: *J. R. Cumming-Bruce* (instructed by Solicitor, H.M. Customs and Excise).

The civilian was charged with knowingly and with intent to defraud Her Majesty of the duty payable thereon, being concerned in keeping goods, namely, the cigars and spirits first described above, which were chargeable with a duty which had not been paid; and, with the like knowledge and intent, being concerned in dealing with the 2,420 cigars, which were chargeable with a duty which had not been paid; in each case contrary to section 304 of the Customs and Excise Act, 1952.

The civilian was convicted upon both charges and fined.

On appeal it was contended that section 257—and not section 304—of the Customs and Excise Act, 1952, was applicable, and that forfeiture was, accordingly, the only sanction available to the respondent.

Held, (1) that it was open to the respondent to charge the civilian under section 304 of the Act;

(2) The goods were chargeable with duty so far as the civilian was concerned; and

(3) That the civilian's conduct clearly amounted to "dealing with" the 2,420 cigars, within the meaning of section 304 of the Act, and that there was ample evidence of the civilian's intent to defraud. [D. C.]

Commentary. Section 257 deals expressly with the particular case of wrongful dealing with goods allowed to be delivered without payment of duty on condition that they will not be sold. Section 257 provides only for the forfeiture of the goods and, unlike section 44 (which provides for the forfeiture of goods improperly imported), it is not followed by a section providing for a penalty for the same act. It was therefore arguable that forfeiture was the only consequence following upon a wrongful dealing with goods properly imported duty free, and that section 304 was confined in its operation to other cases. The court held that this argument was met by the opening words of section 304, "Without prejudice to any other provision of this Act . . . ," and was influenced, in so holding, by the fact that it would have been very surprising if the consequences were limited to forfeiture, since, in many cases, the goods would have been consumed before steps could be taken to forfeit them.

EVIDENCE

Accomplice—statement of one as evidence against the other

R. v. Rhodes

Court of Criminal Appeal: Lord Parker C.J., Cassels and Edmund Davies JJ.: November 9, 1959.[4]

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[4] For the appellant: *John Ward* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Ian Webster* (instructed by the Town Clerk, Rochdale).

R., together with one M., was convicted at quarter sessions of burglary. The evidence against R. consisted of scientific evidence relating to fragments of paint and other material found adhering to his coat and which corresponded with material found in the place where the burglary was committed. The evidence against M. included a statement made to a police officer. Both R. and M. denied in evidence that they were concerned in any way with the offence and said that they had been together at all material times. The jury were directed that M.'s statement was evidence only against M. and then, *inter alia*, as follows: "The evidence shows they were together before the offence was committed, together after the offence was committed, and both say on oath they were together the whole time. . . . If you are satisfied that M. committed the offence and made this admission, that admission, as I told you, is not evidence against R. Once satisfied that M. is guilty, you know that he and R. were together the whole evening; that has been their evidence in this case." R. appealed to the Court of Criminal Appeal on the ground that the direction to the jury was, in effect, an invitation to convict R. if the jury were satisfied that M. was guilty, because R. had himself sworn that at all material times he was in M.'s company.

Held, allowing the appeal, that there had been a misdirection. The conviction of M. did not necessarily involve the conviction of R. The matter could be tested in this way: if M. and R. had been separately tried, could proof of M.'s conviction have been admitted, and, if so, would this evidence, coupled with evidence that the two men had been together at all material times, have been sufficient to justify R.'s conviction? The question permitted only a negative answer. It was, therefore, a misdirection to tell the jury that M.'s conviction could be regarded as forming any part of the case against R. The offence charged had not been proved against R. and, accordingly, the appeal must be allowed. [H. P.]

Commentary. A confession or admission is generally evidence only against the person making it and not against any other person charged with the same offence. To hold that M. was guilty on the evidence of his own statement, and then to couple this finding with the evidence that M. and R. were together was, indirectly, to use M.'s statement as evidence against R.

The conviction of a third party is inadmissible as evidence of the facts on which that conviction was based in subsequent proceedings, either criminal or civil (except, apparently, where it is used to discredit a witness). *Cf. Surujpaul* v. *R.* [1958] Crim.C. & C. 20; [1958] Crim.L.R. 806 and commentary thereon.

Accomplice—unsworn statement of—jury not directed on question of corroboration

R. v. Theo

Court of Criminal Appeal: Lord Parker C.J., Cassels and Diplock JJ.: November 9, 1959.[5]

T., together with one P., was convicted at quarter sessions of receiving a motor-car knowing it to have been stolen. T. had been found by police officers driving a stolen car. P. was in the back of the car. T.'s case at the trial was that he did not know that the car was stolen. P. had made a statement to the police, not in T.'s presence, which implicated T. On appeal to the Court of Criminal Appeal:

Held, allowing the appeal, that this was clearly a case where a warning ought to have been given to the jury not to treat the unsworn statement of P. to the police as evidence against T. There had been no warning to this effect; indeed, the whole tenor of the summing-up was to treat the two prisoners together and not to differentiate in any way between their cases. Accordingly, this court felt, reluctantly, that the conviction would have to be quashed. [H. P.]

Depositions—formal evidence—witness in Canada not notified that attendance required—signing of deposition by magistrate

R. v. Schaffer

Court of Criminal Appeal: Lord Parker C.J., Cassels and Edmund Davies JJ.: October 26, 1959.[6]

S. was convicted at quarter sessions of receiving stolen goods. The goods the subject-matter of the indictment were two charm bracelets, one of which was stolen from the house of Miss R. S.'s case at the trial was that he never had possession of the bracelets at all and that the police, purporting to find the bracelets in his possession, had in fact "planted" them. Miss R. had given evidence at the magistrates' court and had been conditionally bound over to attend the trial. Later notice was given by S. to the clerk of the court that he desired the attendance of Miss R. in order to cross-examine her. Miss R., who was then in Canada, was not in fact notified and, the depositions having been signed by the magistrate in the lower court, her evidence was read at the trial. S. appealed to the Court of Criminal Appeal on the grounds (i) that the jury were wrongly directed that telling a lie when questioned by the police as to the possession of stolen property was some evidence of dishonesty; (ii) that Miss R.'s deposition was wrongly admitted because S. had notified his desire for her attendance and also because the deposition had not itself been signed by the magistrate but only a certificate in a general form at the end of the depositions.

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[5] For the appellant: *Miss E. A. M. Curnow* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *John Rogers* (instructed by the Solicitor, Metropolitan Police).

[6] For the appellant: *D. P. F. Wheatley* (instructed by Marris & Shepperd). For the Crown: *R. I. S. Bax* (instructed by the Solicitor, Metropolitan Police).

Held, dismissing the appeal, that there was no misdirection on ground (i). In regard to the issues whether the bracelets had been "planted" or not and whether, if in possession of them, S. knew they had been stolen, the evidence was perfectly proper. It was very relevant if a man lied when questioned about the possession of stolen property. As to ground (ii), Miss R. had been conditionally bound over because the magistrate had formed the view that she was a purely formal witness. Section 13 (3) of the Criminal Justice Act, 1925, provided that a deposition was not to be read at the trial where the witness had been duly notified that he was required to attend. It was the witness who must be notified and not the clerk of the court and if, as here, the witness had not been notified the deposition could be read. However, this was subject to the inherent jurisdiction of the court to refuse to allow a deposition to be read where it was imperative that the witness should be available for cross-examination. In the present case the court of trial had expressed itself satisfied that Miss R.'s evidence was purely formal. On the question of the signing of the depositions, the general certificate in the form: "I hereby certify that the above depositions of . . . (naming the witness) . . . were taken and sworn before me in the presence of . . . ," etc., in accordance with Form 9 of the Forms Rules of 1952, was sufficient to comply with the requirement that "The deposition must purport to be signed by the justice before whom it purports to have been taken." Accordingly the deposition was properly admitted and the appeal would be dismissed. [H. P.]

Evidence of similar facts—admissibility—to prove identity

R. v. Pickard

Leeds Assizes: Thesiger J.: December 15, 16, 17, 1959.[7]

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[7] For the prosecution: *Geoffrey Baker* (instructed by R. C. Linney, West Riding Prosecuting Solicitor). For the accused: *Donald Herrod* (instructed by J. Levi & Co., Leeds).

P. was charged in successive counts of the same indictment with rape of a girl aged twelve on September 1, 1958, and attempted rape of Elaine Purdey, aged nineteen, on June 9, 1959. Each girl identified P. as her assailant. His counsel requested that these charges should be tried separately. He conceded that if the evidence on the first count were admissible on the second count it was perfectly proper to include the two charges on the same indictment, but contended that the two incidents were entirely separate and that to admit the evidence of the one incident on a trial in respect of the other would prejudice a jury against the accused out of all proportion to its possible slight relevance.

Counsel for the prosecution argued that the evidence was admissible as similar facts to prove identity of the assailant in each case. There were many similarities between the two attacks: both victims were young girls; both assaults took place at about 4.30 p.m. in broad daylight in the same locality (and near P.'s home); both girls were warned by their assailant that he would strangle them if they did not stop screaming; both girls lost their shoes in the struggle; both assailants did not run away after the assault. He did not adduce it as showing a propensity on the part of P. to commit such assaults.

Held, that the evidence was admissible to prove identity, which was the real issue in this case. It might be of assistance to the defence, for if an alibi were to be established for P. in regard to one incident, this might defeat the probative value of the identification of P. in the other incident (considering *R.* v. *Sims* [1946] K.B. 531; *R.* v. *Hall* [1952] 1 K.B. 302; *R.* v. *Straffen* [1952] 2 Q.B. 911; *R.* v. *Robinson* (1955) 37 Cr.App.R. 95; the case of Adolf Beck, Cross, *Evidence*, pp. 268 *et seq*., and Cross, "Sims in England and the Commonwealth" (1959) 75 L.Q.R. 342). Separate trials would therefore not be ordered.

P. was thereupon tried and convicted on both counts.

[JOHN M. COLLINS, *Barrister-at-Law*.]

Commentary. It is well established that similar fact evidence is admissible to prove identity where the facts alleged in the different cases are strikingly similar. It would appear that the proper direction in such a case is that if the jury are satisfied that the accused was the assailant on the first charge, then (and only then) they are entitled to have regard to that fact as assisting them on the issue of identity in the second charge: *R.* v. *Robinson* (*supra*).

Identity—identification at parade by one witness only

R. v. Ross

Court of Criminal Appeal: Lord Parker C.J., Ashworth and Hinchcliffe JJ.: October 2, 1959.[8]

R. was convicted at quarter sessions of obtaining goods by false pretences. The facts were that a large quantity of cigarettes, cigars and matches had been ordered by telephone from wholesale tobacconists. The person ordering the goods had given a name known to the wholesalers and had said that a taxi would call later to collect the goods. In due course the taxi took away the goods. R. denied that he had anything to do with the offence at all and none of the goods was traced to him. The sole evidence against R. was the evidence of the taxi-driver, who had identified him at an identification parade. The taxi-driver was asked at the trial if he could see in court the man who had sent him to collect the goods and his answer was: "I think that might be the man in that box there, but I am not sure." In cross-examination as to the identification parade he said: "Well, I expected the man to be there on the identification parade and I picked out the man who looked most like the man who had engaged me." On appeal to the Court of Criminal Appeal by certificate of the trial judge:

Held, allowing the appeal, that although there had been a most careful direction to the jury in this case, this court felt that no reasonable jury on the evidence could possibly have been satisfied that the onus of proof had been discharged. Accordingly the appeal would be allowed on the ground that there was insufficient evidence to support the verdict. [H. P.]

Commentary. Identification evidence is notoriously subject to error. Dr. Glanville Williams's comment (*The Proof of Guilt*, 2nd ed., 112) that "juries do not recognise its unreliable nature" is supported by the fact that the jury convicted on such unconvincing evidence in the present case. In *R.* v. *Williams* [1956] Crim.L.R. 833 the Court of Criminal Appeal declined to give a general direction requiring a warning to be given to juries of the dangers of convicting without corroboration where there is evidence of identification by only one witness.

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[8] For the appellant: *J. B. Elton* (instructed by Lesser & Co., Stratford). For the Crown: *J. Rogers* (instructed by Penman, Johnson & Ewins, Watford).

FACTORIES ACT

Failure to comply with safety regulation—case where compliance would not necessarily have prevented accident

Cartwright v. William Briggs & Sons, Ltd.

Sheriff Court of Lanark at Glasgow: Sheriff-Substitute Edwyn O. Inglis: 1959 S.L.T.(Sh.Ct.) 68.[9]

A roofer, who was employed by the defenders, fell forty feet through an unprotected opening in a roof which was in the course of construction. The employers were charged with causing the roofer bodily injury, under section 133 of the Factories Act, 1937, in failing to provide guard-rails or a covering pursuant to regulation 30 (1) of the Building (Safety, Health and Welfare) Regulations, 1948.

Regulation 30 (1) provides as follows: " Every accessible opening in a roof or in the floor of a building, working platform, gangway or run, through which any person is liable to fall a distance of more than 6 feet 6 inches, shall be provided with (*a*) a suitable guard-rail or guard-rails of adequate strength to a height of at least three feet above the edge of such opening, together with toe-boards up to a sufficient height, being in no case less than 8 inches, and so placed as to prevent so far as possible the fall of persons materials and tools through the opening; or (*b*) a covering so constructed as to prevent the fall of persons, materials and tools through the opening."

The defenders contended that the regulation did not apply because the provision of a guard-rail would not have prevented the fall; and that the regulation had no application to a roof which was in the course of construction.

Held, that even on the assumption that a guard-rail would not have prevented the fall, a covering which would have done so should have been supplied; and that the regulation applied both to premises fully constructed and to premises under construction. *Montgomery* v. *Monk & Co.* [1954] 1 W.L.R. 258 not followed. [D. C.]

Commentary. Under section 133 of the Factories Act, 1937, the owner or occupier of a factory is liable to a fine of £100 where any person is killed, or dies, or suffers any bodily injury in consequence of a contravention by the occupier or owner of any provisions of the Act or any regulation made thereunder. If strict compliance with the provisions of the Act would not, in the particular circumstances, have prevented the occurrence of an accident then it cannot be said that the accident occurred *in consequence of* a contravention. It seems that where (as in the regulation in issue in the present case) the Act provides for alternative modes of compliance, neither of which is used, an accident, which might have been prevented by one of the modes of compliance but not by the other, occurs in consequence of the breach. Presumably if a guard-raid had been provided in the present case the action would have failed; the accident would not have been prevented but there would have been no " breach " in consequence of which it could be said to have occurred.

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[9] For the defenders: *Maxwell* (instructed by Brown, Mair, Gemmill & Hislop, Glasgow).

In *Montgomery* v. *Monk & Co.* Somervell L.J. expressed the opinion, *obiter*, that regulation 30 applies only to openings in a roof and not to its construction. It was this dictum which the sheriff-substitute declined to follow.

FORGERY

Intent to defraud—whether financial loss necessary

R. v. Garland

Pontefract Borough Quarter Sessions: G. F. Leslie, Esq., Recorder: December 18, 1959.[10]

G. was charged with forgery of a document with intent to defraud, contrary to Forgery Act, 1913, s. 4 (1). At the material time he was a police officer stationed at Pontefract. Whilst off-duty he was driving a car when it was involved in a collision. When asked by Police Sgt. C. to produce his driving licence and certificate of insurance he pretended that he did not have them with him and arranged with C. to produce them at Pontefract within five days. In consequence C. sent the customary form (H.O.R.T.2) to the Pontefract police for the officer-in-charge to complete when G. produced his licence and insurance certificate. In error the form was placed in G.'s pigeon-hole. G. was in fact a learner-driver and had only a provisional licence: in order to conceal the fact that he had been driving without L-plates and unaccompanied by a competent driver, he completed the form himself, inserting as the date of expiry of his licence " 17th August, 1962," which would have been its date of expiry if it had been an ordinary 3-year licence. He signed the form " F. Herrick, Inspector-in-Charge " and himself sent it back to C. Inspector Herrick said in evidence that had the offences not been concealed,

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[10] For the prosecution: *H. S. Pears* (instructed by R. C. Linney, West Riding Prosecuting Solicitor). For the defendant: *G. M. Smailes* (instructed by Hague, Dixon & Burn, York).

G. would not have been dismissed, but his chances of promotion would probably have been affected.

Counsel for the defendant submitted that there was no case to answer. He conceded that there clearly had been a forgery by G., but asserted that there was no evidence of intent to defraud as distinct from intent to deceive. G.'s object was to avoid being prosecuted for the offences he had committed: there was no intent to defraud anybody of anything. He referred to the dictum of Buckley J. in *Re London & Globe Finance Corpn.* [1903] 1 Ch. 728, 732, and to the criticism of it in *Russell on Crime* (11th ed.), pp. 1428–30, and distinguished *R.* v. *Bassey* (1931) 22 Cr.App.R. 160 and *R.* v. *Potter and Another* [1958] 1 W.L.R. 638, on the ground that both were cases where the accused obtained some positive benefit to which he was not entitled by his forgery, in *Bassey*, the advantages of membership of an Inn of Court and in *Potter*, a driving licence. The possibility of financial loss being suffered by anyone in this case was too remote. The contrast was clearly shown in conspiracy cases, conspiracy to defraud being a totally different offence from conspiracy to pervert the course of justice.

For the prosecution it was urged that G.'s whole object had been, not merely to deceive, but to induce a course of action, to prevent a prosecution and the attendant publicity, and to prevent his employers finding out so that it would not influence his career or affect his chances of promotion. There was a risk of financial loss both to his employers who might go on paying G. wages—or additional wages on promotion—which he would not otherwise have obtained (relying on *R.* v. *Wines* (1953) 37 Cr.App.R. 197) and to the public, as he would almost certainly have been fined in the normal course of events.

Held, rejecting the submission, that although *Wines* was distinguishable on the facts the court was bound by *Bassey* and the definition of intent to defraud laid down by Buckley J. Clearly G.'s intent was to prevent further action being taken by the police which would result to his detriment. There was evidence that by preventing further inquiries G. was almost certainly preventing his being fined and the public would suffer thereby. It was not however necessary to prove an intent to cause financial loss: there was no such loss in *Bassey*. In *Bassey* the Benchers had a special duty in regard to the admission of persons as students of their Inn; in this case the police have a special duty with relation to enforcing the provisions of the Road Traffic Acts. There was no difference in law between causing persons to act—as in *Bassey*—and causing persons to refrain from acting. In causing the police to refrain from performing their duty he was inducing them to act to their injury and to the injury of the public.

G. was convicted of the offence.

[JOHN M. COLLINS, *Barrister-at-Law.*]

Commentary. Mr. J. W. C. Turner has persistently criticised *Bassey* in successive editions of *Russell* (*op. cit.*) and *Kenny's Outlines of Criminal Law* (17th ed., 350) on the ground that there was no evidence of that intention to cause economic loss which, in his submission is the essence of defrauding. The test of economic loss is also favourably regarded by Glanville Williams, *The Criminal Law*, 77, and is advocated by Mr. G. H. L. Fridman, " Intent to Defraud " [1958] Crim.L.R. 503.

The broad rule adopted in *Bassey's* case, that an intent to induce the prosecutor " to act to his injury " is enough, certainly gives to the word " defraud " a meaning wider than its ordinary, natural meaning. Mr. Turner argues, " a man . . . may, for example, be deceived into drinking poison which is represented to him to be water, yet it could not be maintained that he was thereby defrauded." (*Russell, op. cit.*) Yet even this extreme example does not extend the *legal* meaning of the word impossibly far; for the person representing the liquid to be water (apart from his criminal liability) is guilty of fraud for the purposes of the tort of deceit; and the victim of a fraud may, not unreasonably, be said to be " defrauded." A greater difficulty is that the term " defraud " is contrasted with " deceive " in the Act. As a man will hardly ever deceive another by a forgery without intending him to act on it, the application of the *Bassey* test would virtually eliminate the distinction between defrauding and deceiving which the Act requires.

It is submitted, however, that the notion of economic loss is not an entirely satisfactory one. This may be shown by comparing *R.* v. *Toshack* (1849) 1 Den. 492 with *Bassey*. In the former case the prisoner, by a forgery, induced the Trinity House examiners to grant him a certificate of fitness to act as a master of ships. It was held that he was guilty and the case satisfies the test of economic loss since the indictment alleged that, by his fraud, T. had obtained from the examiners a piece of paper (his certificate) to the value of one penny. Bassey, on being admitted to an Inn of Court received no certificate of membership or paper of any kind. If he had done, the test of economic loss would apparently have been satisfied. Yet the gravamen of the charge is surely the acquisition by the accused of certain rights, and it would be grotesque that his liability should depend on whether those rights were or were not evidenced by a piece of paper of infinitesimal value. If the examiners of Trinity House were defrauded it was not because they had lost the value of a penny but because they had conferred certain rights on the accused which they ought not to have done. The same observations apply to *R.* v. *Potter* [1958] 1 W.L.R. 638.

The test of economic loss, as applied in *Toshack* leads to the further absurdity that guilt will depend, not on whether a piece of paper is actually supplied, but on whether the accused knows or believes that one will be supplied. The question is not whether there is an actual defrauding but whether there is an intent to defraud. Thus, if D.

applies for membership of a certain club his guilt will depend on whether he knows or believes that the club issues a membership card; if he does, he has an intent to defraud, whether the club actually issues membership cards or not; if he believes the club does not issue cards, or if he does not advert to the matter at all, he has no intent to defraud. This is a narrow, technical notion of defrauding which completely ignores the substance of the matter.

It is submitted that a better test would be one of benefit conferred by the victim. Such a test would justify the convictions in *Toshack, Bassey* and *Potter,* but would exclude from liability Mr. Turner's man who lies about the poison or Dr. Williams's man who forges a letter in order to induce P. to walk to a certain spot (*The Criminal Law*, p. 76) (assuming, in both cases, no evidence that the accused expected to profit in some way as a result of the action he caused to be taken). The distinction between defrauding and deceiving, which the statute requires, would then be preserved.

By such a test, the present case might be distinguishable on the ground that no positive benefit was conferred on the prisoner (*cf.* counsel's argument, above) though it is thought that a better view would be that benefits may be conferred by inaction as well as by action, and that the prisoner intended to obtain such a benefit in the present case.

LARCENY

Refusal by barman to sell drinks after hours—drinks taken—promise to pay later—no payment made

R. v. White

Court of Criminal Appeal: Lord Parker C.J., Ashworth and Hinchcliffe JJ.: October 5, 1959: 103 S.J. 814.[11]

W. was convicted at quarter sessions of the larceny of a bottle of beer and robbery of two miniature bottles of whisky and two bottles of port. The offences arose out of incidents which occurred in a public house after closing time. W., who was with a friend, asked the barman to serve some beer. The barman refused, whereupon W. helped himself to beer. Later W. demanded two miniature bottles of whisky which the barman put on the counter. Finally, W. stood on the counter and helped himself to two bottles of port. W. wrote out an IOU for the whisky and said that he would go back later to pay for everything, but he never in fact did so. On appeal to the Court of Criminal Appeal:

Held, that the taking of the bottles (apart from the whisky) could not be said to be a taking with a claim of right. This was a case where a man took articles not only without the consent of the owner but knowing that the owner would not consent, whether he offered to pay in cash or promised to pay in the future. At the material time those articles were in no sense of the words for sale. The question of payment or a promise to pay in the future might in certain cases be material, for example, where the person making the payment or the promise to pay had every reason to believe that the consent of the owner would be forthcoming. But the present case was one where there was a deliberate taking of goods without the consent of the owner and which the owner had expressly refused to sell. However, it would be dangerous to allow the conviction of robbery of the whisky to stand because the barman had put the bottles on the counter, asked for payment and parted with them against the IOU which was given and, accordingly, there was not sufficient evidence to constitute either robbery or larceny. This court was not satisfied that such amount of force and threats were used in the case of the bottles of port as to constitute robbery. The correct finding was guilty of larceny of the beer and the port only, but the sentence of five months' imprisonment would stand. [H. P.]

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[11] For the appellant: *P. Esling* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Herrick Collins* (instructed by the Somerset County Police).

MISPRISION OF FELONY

Misprision of felony—constituents of offence—whether benefit necessary—test of reasonable man

See R. *v*. WILDE & OTHERS, p. 116, *ante*.

OFFENSIVE WEAPONS

Prevention of Crimes Act, 1953—knife intended for use as housebreaking tool

Farrell v. Rennicks

Sheriff Court of Lanark at Airdrie: Sheriff-Substitute Thomas Young: 1959 S.L.T. (Sh.Ct.) 71.[12]

Rennicks was charged with attempted housebreaking, and with having in his possession, on the same occasion, without lawful authority or reasonable excuse, an offensive weapon, namely, a sheath-knife, contrary to section 1 (1) of the Prevention of Crimes

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[12] For the complainer: Procurator-Fiscal, Airdrie. For the respondent: Michael J. Cross (Solicitor).

Act, 1953. Rennicks pleaded guilty to the first charge, but not guilty to the second.

In evidence Rennicks explained that the knife was in his possession for use as a housebreaking tool, and not for the purpose of causing injury to the person.

Held, that "to succeed the Crown must prove one of three things: either that the knife was 'an article made or adapted for use for causing injury to the person' or 'intended by the person having it with him for such use by him'"; and that since the Crown had failed to prove any of these things, the charge was not proven. [D. C.]

Commentary. Under the Prevention of Crime Act, 1953, s. 1 (1): "Any person who, without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon shall be guilty of an offence. . . ." *Cf. Woodward* v. *Koessler* [1958] Crim.C. & C. 86; [1958] Crim.L.R. 754 and Commentary thereon.

RECEIVING

Goods deposited in room — joint tenant — evidence of guilty knowledge

R. v. Peach

Court of Criminal Appeal: Lord Parker C.J., Ashworth and Hinchcliffe JJ.: October 5, 1959: 103 S.J. 814.[13]

P. was convicted at quarter sessions of receiving stolen property. P. shared a room in a lodging house with another man. On the day in question P., having been away during the night, returned to his room at 9.30 a.m. The stolen property, namely fourteen motor-tyres, was then in the room and, in a statement to the police, P. had said that, having seen the tyres on his return, he had gone to bed. Later, he denied having seen the tyres until he had woken up at about 1 p.m. On appeal to the Court of Criminal Appeal on the question of possession and control:

Held, dismissing the appeal, that if P. had been a stranger in the room rather than a joint occupier, the mere fact of knowledge that the goods were stolen combined with the mere fact that he had done nothing about the goods for some hours would not constitute him a receiver. But in the case of a joint tenant of a room knowledge that the goods in the room were stolen and the absence of any steps being taken by him to get the other joint tenant to remove the goods was capable of amounting to evidence that he was in joint possession and control of the goods. This court, moreover, was impressed in this case by the fact that P., when directly questioned told a complete untruth. The case for prosecution had, therefore, been made out and the appeal would be dismissed. [H. P.]

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[13] For the appellant: *R. S. Insall* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *A. R. M. Ellis* (instructed by Hawley & Rodgers, Leicester).

Commentary. If an occupier of premises finds that goods, which he knows to have been stolen, have been deposited on his premises without his connivance and he takes no steps to remove them, is he guilty of receiving? It is thought not. Receiving surely requires something more positive than a passive acquiescence in the presence of stolen goods on one's premises. Moreover, a guilty retaining of stolen goods is not receiving: *R.* v. *Matthews* (1950) 34 Cr.App.R. 55.

It is thought, however, that the present case is not inconsistent with these propositions. It was not, apparently, held that the facts proved amounted in themselves to receiving; but only that they were evidence that there had been a guilty receiving. The fact that the prisoner tells a lie about how he received the goods is not, by itself, sufficient evidence that the goods were stolen: *Cohen* v. *March* [1951] 2 T.L.R. 402; but, where there is independent evidence that the goods were stolen, the telling of lies is cogent evidence of guilty knowledge.

ROAD TRAFFIC

Causing death by dangerous driving—admissibility of evidence of drinking

R. v. Richardson

Leeds Assizes: Elwes J.: December 10, 11, 1959.[14]

R. v. Fisher

Leeds Assizes: Mr. Commissioner Skelhorn Q.C.: December 10, 11, 1959.[15]

In both these cases the defendant was charged with causing the death of a person by dangerous driving. Both cases were tried on the same days and in both the prosecution sought to lead evidence that the defendant had been to certain public-houses and had taken drink before the accident. In neither case was the defendant charged with the offence of driving when under the influence of drink. In both cases witnesses were called for the sole purpose of deposing as to the defendant having consumed alcohol.

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[14] For the Crown: *Geoffrey Baker* (instructed by R. C. Linney, West Riding Prosecuting Solicitor). For the defence: *Alan Goss* (instructed by Heninghem, Armstrong & Ambler, York).

[15] For the Crown: *H. G. Bennett* (instructed by R. C. Linney, West Riding Prosecuting Solicitor) For the defence: *H. C. Beaumont* (instructed by C. W. Nelson & Co., Leeds).

In the first case counsel for the defence emphasised that if it were suggested that drink was in any way a contributory factor to the accident the prosecution had had every opportunity of bringing a charge of driving under the influence of drink and had chosen not to do so. The only question for the jury was how was the defendant driving and such evidence was both prejudicial and irrelevant.

Elwes J. held that such evidence was always admissible quite irrespective of whether there was a charge of driving under the influence of drink. When the evidence disclosed that a car was being driven in a certain manner such evidence was undoubtedly relevant to a charge of dangerous driving. He referred to an unreported case at Bedford Assizes in which he had appeared for the prosecution and the matter had been argued before Byrne J. who had rejected the arguments put forward by the defence. He observed that he was surprised that there appeared to be no reported decision on this point.

In the second case counsel for the defendant emphasised that such evidence was highly prejudicial to the defendant and raised a multiplicity of issues. It was most undesirable that the principle should be established that where no charge of driving under the influence of drink was brought, not merely assize courts but even magistrates' courts considering charges of careless driving or speeding could treat as relevant the question of whether the defendant had taken alcohol. It had frequently been stated that the test of whether driving was dangerous or not was objective and not subjective. Therefore the evidence as to whether or not the accused had taken drink was irrelevant and inadmissible. Even if it were admissible the court had a discretion to exclude it because its slight relevance was out of all proportion to its prejudicial effect.

Counsel for the prosecution replied that such evidence was part of the surrounding circumstances. It was clearly relevant to any defence put forward to know what the accused's state of mind was at the time of the accident. For instance, if the defendant were to say that a violent swerve was in order to avoid some object which he had seen in the road, it would surely be relevant when assessing the reliability of his evidence to know whether or not he had taken drink beforehand. Merely because the evidence disclosed a criminal offence other than that charged did not render it inadmissible. He referred to the decision of Elwes J.

The learned Commissioner, describing the decision of Elwes J. as "strong persuasive authority," admitted the evidence.

Both defendants were subsequently convicted.

[JOHN M. COLLINS, *Barrister-at-Law.*]

Commentary. It is submitted with great respect that evidence that an accused person has been drinking is so slightly relevant when the question is solely as to the manner in which he drove his car on a particular occasion, that it ought to be excluded. Its only logical relevance is that persons who have been drinking are generally believed to be both more reckless and slower in reaction than when they have not been drinking; and, therefore, a person who has been drinking is more likely to have driven dangerously on the particular occasion than if he had not been drinking. But then a man who is angry or irritable is more likely to drive dangerously than when he is not. Is evidence to be admitted that a driver had just had a quarrel with his wife, or lost his job or that he had a "hangover"? It is respectfully submitted that, the test being, as counsel said, the purely objective one of the manner in which the accused drove on the particular occasion, the evidence should be confined to direct testimony as to that fact.

The argument of counsel for the prosecution in the second case seems, with respect, to be a remarkable instance of crediting "the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice": *Thompson* v. *R.* [1918] A.C. 221, 232, *per* Lord Sumner.

Principles of Punishment

Sentences in the Court of Criminal Appeal

Prepared by HENRY PALMER, *Barrister-at-Law*

Preventive detention

In R. *v.* ASTLEY, the court (Lord Parker C.J., Cassels and Edmund Davies JJ.: October 26, 1959) reduced a sentence of seven years' preventive detention to one of five years' preventive detention on account of the appellant's age. A., who was sixty-nine years of age, had pleaded guilty to obtaining credit by fraud and attempting to obtain money by false pretences. The total sum involved in the offences was about £10. The court stated that A. had an appalling record of obtaining credit by fraud. He was last released from prison on May 28, 1959, and on June 8, was passing worthless cheques. The only matter which had given this court some concern was the appellant's age and, having regard to that, the sentence would be reduced from seven years' to five years' preventive detention.

Preventive detention

In R. *v.* BURGE the court (Lord Parker C.J., Cassels and Diplock JJ.: November 16, 1959) upheld a sentence of seven years' preventive detention. B. was convicted at a magistrates' court of receiving a stolen bicycle and sentenced by quarter sessions. B., who was a man of thirty-four years of age, had fifteen previous convictions. The court stated that they had previously adjourned the case in order that there should be a medical report. That report now disclosed that B. had a history of schizophrenia which had been arrested by treatment, and that he would be given such treatment as was possible in prison. This court felt, like the chairman of quarter sessions, that a long period of detention was probably in B.'s best interests and, accordingly, there was no reason to interfere with the sentence of seven years' preventive detention.

Preventive detention

In R. *v.* HASEMORE the court (Lord Parker C.J., Hilbery and Salmon JJ.: November 30, 1959) varied a sentence of eight years' preventive detention to one of imprisonment for three years. H. had pleaded guilty at a magistrates' court to obtaining goods by false pretences and was sentenced by quarter sessions. H., who was a man of thirty-seven years of age, had sixteen previous convictions. Omitting his earlier offences, he was sentenced to two years' imprisonment in 1953 for shopbreaking. He was given short sentences of imprisonment in 1955 and 1956 and, in one of those cases, seventy-six other offences were taken into consideration. Finally, in 1957, he was sentenced to six months' imprisonment for shopbreaking, storebreaking and obtaining credit by fraud. The present offence consisted of obtaining a warming-pan and an emerald ring, worth about £40, from an antique shop. The court stated that H. had a perfectly shocking record and clearly qualified fully for preventive detention. The matter that concerned the court, however, was that since his release from the sentence in 1957 H. had on two occasions obtained work, which he had kept, and was said to be a good workman. He had only lost those jobs through illness. This court thought that, in those circumstances, this man should be given another chance before being sent to preventive detention. Accordingly, a sentence of three years' imprisonment would be substituted for the sentence of eight years' preventive detention.

Preventive detention

In R. *v.* PORTER the court (Lord Parker C.J., Hilbery and Pearson JJ.: December 15, 1959) refused an application for leave to appeal against a sentence of five years' preventive detention. P. had pleaded guilty at quarter sessions to larceny from a dwelling-house and office-breaking. Five other offences were taken into consideration. P., who was a man of fifty-eight years of age, had twenty previous convictions. The court stated that they had more than once disapproved of a sentence of preventive detention as short as five years and had pointed out that, where preventive detention was the right sentence for the protection of the public, there should be a minimum of seven years or, perhaps, eight. There were exceptional cases where it might be appropriate to impose five or seven years, for example, if a man would be liable to die in prison. This court felt that the recorder in the present case must have had in mind the reported cases and that there must have been exceptional circumstances. Accordingly, the application would be refused.

Imprisonment

In R. *v.* PHILLIPS AND BRIDGEWATER the court (Lord Parker C.J., Cassels and Havers JJ.: November 2, 1959) reduced sentences of twelve months' imprisonment to nine months' imprisonment. P. and B. had been convicted at quarter sessions of shopbreaking and larceny. P. was a young man of twenty-one years of age and B. was a young man of twenty-three. Neither of them had any previous convictions. The offence was committed when P. and B., with another young man who was the ringleader, broke into a shop and stole goods to the value of £450. The court stated that they had considered carefully whether the appellants ought to be put on probation. But the court felt that this was such a serious offence, and one which was rife all over the country today, that it would be quite wrong that it should appear that men of this age, even with their first offence, could expect probation. No doubt the young man today did expect probation in such a case as this, but the court felt that for men of this age it would be quite wrong to substitute any such sentence. But the appellants having been in custody since May, the court would substitute a sentence of nine months' imprisonment in each case for the sentence of twelve months' imprisonment, the result being that the appellants would be released, if they had been of good conduct, in about a month.

Imprisonment

In R. *v.* GINGER the court (Lord Parker C.J., Hilbery and Salmon JJ.: December 1, 1959) refused an application for leave to appeal against a sentence of seven years' imprisonment. G. had pleaded guilty at the Central Criminal Court to nine offences of larceny, forgery and conversion. Fifteen other offences were taken into consideration. G., who was a man of fifty years of age, was a bank manager and previously of good character. The offences involved a total sum of £15,714. The court stated that they found it difficult to say that the sentence was wrong in principle. G. had got into trouble with bookmakers and systematically robbed his employers. As a bank manager he was in a position of trust. The application would, therefore, be refused.

Probation

In R. *v.* LORCH the court (Lord Parker C.J., Hilbery and Salmon JJ.: December 7, 1959) substituted a probation order for a sentence of borstal training. L. had pleaded guilty at quarter sessions to shopbreaking and larceny. L., who was a young man of eighteen years of age, had no previous convictions (except motoring offences). The offence was committed when L., with another young man, got into a shop by means of a key which they had filed down and, armed with a screwdriver and a chisel, attempted to break into a safe. In fact they stole £8 15s. from a till and a quantity of cigarettes and other goods to the value of £90. The court stated that this was a premeditated offence; but the trouble only arose because L. had difficulty in obtaining employment. The court now had a report from the boy's housemaster at borstal which stated that L. was reliable, mature, intelligent, a young man of character and determination and had shown himself a steady and conscientious worker. The probation officer had now reported that L.'s father had developed a farm and was willing to employ L. full time. The original sentence of borstal training was not in any way wrong but, in the circumstances, the court felt they could be lenient and, accordingly, a probation order for three years would be substituted for the sentence of borstal training. It would be a condition of the order that L. worked in such employment as the probation officer directed.

Acts and Orders *

Aliens

A number of Orders listing seaports and airports which are approved for the purposes of the Aliens Order, 1953 (S.I. 1953, No. 1671), are revoked and consolidated with one change of substance, namely, the omission of Croydon from the list of approved airports. Operative December 4, 1959. ALIENS (APPROVED PORTS) ORDER, 1959 (S.I. No. 2108) (3d.).

Birds

Trethias Island, Cornwall, is established as a bird-sanctuary, and subject to the provisions of the Protection of Birds Act, 1954, any person who at any time wilfully kills, injures or takes or attempts to kill, injure or take any wild bird on the island, or who wilfully takes or destroys an egg of any wild bird there, shall be guilty of an offence against the Act. Operative January 1, 1960. WILD BIRDS (TRETHIAS ISLAND SANCTUARY) ORDER, 1959 (S.I. No. 2009) (2d.).

For penalties for contraventions, see section 12 (2) of the Protection of Birds Act, 1954.

Food and Drugs

The Fluorine in Food Order, 1947 (S.R. & O. 1947, No. 1134), is replaced in its application to England and Wales. The Regulations prescribe reduced maximum limits for the fluorine content of acidic phosphates used for food purposes and of foods containing acidic phosphates. Operative March 14, 1960. FLUORINE IN FOOD REGULATIONS, 1959 (S.I. No. 2106) (3d.).

For penalties for contraventions, see Regulation 5 of these Regulations.

London Traffic

The London (Waiting and Loading) (Restriction) Regulations, 1958 (S.I. No. 660), as amended, impose restrictions on the sale of goods from vehicles, or vehicles with regard to waiting, loading and unloading and on the use of vehicles for the purposes of advertisements in certain streets in the City of London, in Metropolitan Boroughs and in other districts within the London

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* Prepared by F. Maurice Drake, *Barrister-at-Law.*

Traffic Area. These Regulations are now amended, the principal changes being (1) the above restrictions now apply in additional streets or parts of streets in Battersea, Camberwell, Cobham, Coulsdon, Croydon, Dagenham, Deptford, Eastcote, Hampstead, Harrow, Hendon, Hounslow, Ilford, Lambeth, Walthamstow, Wandsworth, Westminster, Wimbledon and Wood Green; (2) the restrictions other than those relating to the sale of goods from vehicles now apply in further streets or parts of streets in Harrow and Shoreditch. Operative November 27, 1959. LONDON (WAITING AND LOADING) (RESTRICTION) (AMENDMENT) (NO. 3) REGULATIONS, 1959 (S.I. No. 1942) (5d.).

For penalties for contraventions, see Regulation 15 of the London (Waiting and Loading) (Restriction) Regulations, 1958 (S.I. No. 660).

Parking places on certain highways in the City of Westminster are designated as places at which charges may be made by the council of that city for vehicles authorised by the Order to be left in those parking places, the location of which is described in the Schedule and shown on the plan referred to in the Order (Article 3). These parking places are to be in operation between 8.30 a.m. and 6.30 p.m. on Mondays to Fridays and 8.30 a.m. and 1.30 p.m. on Saturdays, any such day not being Christmas Day, Good Friday or a Bank Holiday (Article 2 (1)). The vehicles which may be left in the parking places are passenger vehicles, goods vehicles, motor-cycles or invalid carriages (Article 7), all of which terms are defined in Article 2. The periods for which the vehicles may be left in these places and the amount of the charges are specified (Articles 8, 9, 10). Provision is made for the installation of parking metres (Article 13) and for payment of the initial charges by the insertion of coin in the meters. Excess charges are to be paid direct to the council (Article 12). Provision is further made for the attachment of notices to vehicles by parking attendants to indicate that the excess charge has been incurred (Article 9 (2)) and in certain other circumstances (Articles 8 (2) and 10 (2)), for the removal of vehicles from the parking places in certain circumstances (Article 18), the suspension of the use of the parking places (Articles 21 and 22), for vehicles to wait free of charge in the parking places for certain specified purposes, *e.g.*, to enable persons to board or alight from such vehicles (Article 24) and for other matters arising out of the application of the Order. Operative for preliminary purposes to enable the council to carry out works and acquire the parking meters, on December 17, 1959, and as to the remainder

April 4, 1960. PARKING PLACES (WESTMINSTER) (NO. 1) ORDER, 1959 (S.I. No. 2104) (1s. 9d.), as amended by S.I. No. 2105 (3d.).

For penalties for contraventions, see section 22 of the Road Traffic Act, 1956.

The following Orders have been made detailing prescribed routes: S.I. Nos. 1941 (Stepney) (2d.); 1964 (Camberwell) (3d.); 1994 (Enfield and Southgate) (2d.); 2051 (City of London) (2d.).

The following Order has been made prohibiting cycling on footpaths: S.I. No. 1995 (Epping) (2d.).

The following Order has been made prohibiting waiting: S.I. No. 2052 (Sevenoaks) (3d.).

Magistrates' Courts

The following Order has been made in respect of petty sessional divisions: S.I. No. 2088 (Shropshire) (4d.).

Revenue

The lists of banks and other persons authorised to deal in gold and foreign currency, and the list of authorised depositaries with whom certain securities are required to be deposited, under the provision of the Exchange Control Act, 1947, are amended. Operative December 1, 1959. EXCHANGE CONTROL (AUTHORISED DEALERS) (AMENDMENT) (NO. 2) ORDER, 1959; (AUTHORISED DEPOSITARIES) (AMENDMENT) (NO. 2) ORDER, 1959 (S.I. Nos. 1999 and 2000) (each 2d.).

For penalties for contraventions, see Schedule 5 to the Exchange Control Act, 1947.

Road Traffic

The Motor Vehicles (Construction and Use) Regulations, 1955 (S.I. No. 482), and the Motor Vehicles (Construction and Use) (Track Laying Vehicles) Regulations, 1955 (S.I. No. 990), are further amended.

The principal changes affecting all vehices including track-laying vehicles are:

1. The definition of the expression "land locomotive" is extended to include vehicles used for hauling a certain kind of trailer (defined as a "land implement conveyor") which complies with certain conditions and which is designed for carrying land implements (Reg. 2 (1) (*b*) and (*c*)).

2. The expression "land tractor" is re-defined to include tractors used primarily for work on land and which are constructed or adapted to carry certain kinds of load by means of a fitted appliance which satisfies certain specified conditions (Reg. 2 (1) (*d*)).
3. Certain provisions of the 1955 Regulations applicable to motor-tractors are made to apply, and other provisions are made not to apply, to land tractors if, while used on a road, they comply with certain conditions (Reg. 2 (4) of S.I. No. 1936; Reg. 2 (2) of S.I. No. 2053 (Track Laying Vehicles)).
4. Regulation 11 (Reg. 10 of the Track Laying Vehicles Regulations) (which requires the provision of a warning device on motor-vehicles fitted with a braking system which embodies a vacuum or pressure reservoir) no longer applies to vehicles, the unladen weight of which does not exceed 3 tons, if certain conditions are fulfilled (Reg. 2 (6) of S.I. No. 1936; Reg. 2 (4) of S.I. No. 2053 (Track Laying Vehicles)).
5. Every motor-vehicle is required to be equipped with such lighting equipment and reflectors, and the equipment and reflectors are required to be maintained at all times while the vehicle is used on a road in such a condition, as to render the vehicle capable of being driven on a road at night without contravention of the provisions of the Road Transport Lighting Act, 1957, or any regulations in force under it, as to obligatory lamps or reflectors. Every headlamp of a motor-vehicle is required to be so constructed and fitted, and at all times while the vehicle is used on a road to be maintained in such a condition, that if the lamp were used to show a light to the front while the vehicle was driven on a road at night the provisions of Regulation 9 of the Road Vehicle Lighting Regulations, 1959 (S.I. No. 1869), which relate to the prevention of dazzle by lamps, would not be contravened. Certain exemptions in relation to those requirements are provided (Reg. 2 (10) and (21) of S.I. No. 1936; Reg. 2 (8) and (9) of S.I. No. 2053 (Track Laying Vehicles)).

The following changes apply only to vehicles other than track-laying vehicles:

1. The exemptions from certain of the provisions of the 1955 Regulations applicable to trailers are extended to include land implement conveyors and provision is made for exempting land implement conveyors from certain provisions

of the Regulations when drawn by land tractors (Reg. 2 (4) (5) (17) (19) and (20)).

2. Motor-vehicles submitted for an examination under section 1 of the Road Traffic Act, 1956, while being used on roads in connection with the examination by or under the direction of a person empowered to carry out the examination, are exempted from certain of the provisions of the 1955 Regulations (Reg. 2 (3)).
3. The regulations relating to the brakes of locomotives, motor-tractors, heavy motor-cars and motor-cars are modified so that in additional cases the braking of more than one of the front wheels may be reckoned for the purposes of the requirements as to the minimum number of wheels which must be braked by either of the means of operation of a braking system (Reg. 2 (11) (12) (13) and (15)).
4. The requirements as to the brakes to be fitted to motor-cars registered before January 1, 1915, and to motor-cycles registered before January 1, 1927, are modified (Reg. 2 (14) (16)).

MOTOR VEHICLES (CONSTRUCTION AND USE) (AMENDMENT) REGULATIONS, 1959 (S.I. No. 1936) (6d.), operative December 7, 1959. MOTOR VEHICLES (CONSTRUCTION AND USE) (TRACK LAYING VEHICLES) (AMENDMENT) REGULATIONS, 1959 (S.I. No. 2053) (4d.), operative December 21, 1959.

For penalties for contraventions, see rule 104, and sections 111 and 113 of the Road Traffic Act, 1930.

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 11 New Fetter Lane, London, E.C.4." The questions of readers only are answerable in the Review. All questions should be submitted in triplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

65. *Licensing laws—police entry into registered clubs outside licensing hours*

It is the practice in this part of the country to enter registered clubs during non-permitted hours and report any offence committed there contrary to the Licensing Act, 1953. Entry is usually made after the poice officer has detected outside the fact that an offence is being committed within. Is there any such legal power of entry?

I may say that such cases have gone through the courts here several times recently without comment. Is there any case stated on this point? [K. B. E.]

ANSWER

There is no such legal power of entry and the police officer is not following the special provisions for entry enacted in the Licensing Act, 1953.

These special provisions are contained in section 145 of the Act, which provide that if a justice of the peace is satisfied by information on oath that there is reasonable ground for believing that any registered club is so managed or carried on as to constitute a ground for striking it off the register of clubs . . . he may issue a search warrant under his hand to a constable authorising him at any time or times within one month from the date of the warrant to enter the premises of the club.

It is to be observed that the warrant may be executed "at any time or times," and hence includes a Sunday; and the section further provides that entry may be effected by force, if need be, and the constable may seize any documents relating to the business of the club. The rights of the club are safeguarded by requiring the information on which the warrant is issued to be on oath.

Thus, the practical effect is that where a constable has detected from without that an offence is being committed he has two possible courses of action, *viz*., (a) to take proceedings and prove the offence by what he has detected from outside, at the same time knocking on the door of the premises and calling upon the occupants to cease drinking, or (b) to go before a magistrate, obtain a search warrant and then execute it at any later time during the following month at which it appears that an offence is being committed.

The above observations do *not* apply to any club for which a justices' licence has been obtained, in respect of which section 151 gives express power of entry; nor to any club premises for which a special hours certificate is in force—in respect of which section 151 equally applies. [M. D.]

Books and Periodicals

Book reviews:

Theoretical Criminology. By George B. Vold. New York: Oxford University Press. 1958. 315 and (bibliography and index) 18 pp. 40s. net.

The author of this book, a sociologist, sets out to describe the various theories as to the causation of crime, beginning with the two broad approaches, demonological and naturalistic. He then considers the leading theories from the early nineteenth century up to date. The historical background certainly puts in perspective the emphasis on free will and the degree of pain and pleasure that the criminal was thought to calculate according to the classical school of criminological thought. Also, as theory follows theory throughout the decades—physical type, mental tester, general heredity, psychopathy—the development of more scientific thinking is emphasised. " Each particular theory represents primarily a possible approach and then in turn reflects some special point of view rather than any full-blown, unitary accounting for all crime in all societies at all time " (p. 305). This is so whatever the research method used may be, whether it is statistical studies of individual differences or case studies of individuals or groups in action.

To the person with legal interests, and particularly to the common lawyer who is trained to work empirically, the theory unattached to penal practice is unsatisfactory. Nevertheless, the book has set out in a reasonably terse form the many causes or precipitating factors which have been conceived at one time or another as being at the root of criminal behaviours. It certainly makes apparent the need today for adequate medical, psychiatric and social reports on the criminal, both for the use of the court, if reformation is to be considered, and of the authorities who may handle the offender subsequent to the sentence. These are all matters now under consideration by the Streatfeild Committee.

This is a book that would be useful for reference purposes, for the chief research work in relation to the various theories is carefully documented and considered. It would also be of value as an introduction to the subject for anyone who has given some consideration to the problem of crime and wishes to correlate his reflections. The book gives a perspective and has a quite unbiased approach. As Freud has taught even the unconverted not to recount their dreams at the breakfast table, so this book will teach the reader not lightly to spin " novel " theories as to the " causes " of crime.

T. E. JAMES.

Courts for Adolescents. By Hermann Mannheim, DR.JNR. London: I.S.T.D. 1958. 23 pp. 1s. 6d. net.

This booklet might be called Notes for the Benefit of the Ingleby Committee, which Dr. Mannheim clearly has in mind in writing it.

The author makes a strong case for the establishment of special courts for boys between seventeen and twenty-one years of age. The problem of young girl offenders between these ages is only touched upon. Although he admits that this group does not show the highest crime rate of all groups, it is convincingly argued that boys between seventeen and twenty-one have very specific emotional, intellectual and other needs. Moreover, since we have in general accepted the principle of individualisation of treatment, for the lower age groups at least, and since at present the borstal sentence is well established for youthful offenders between sixteen and twenty-one, the argument is impressive.

There are various ways, Dr. Mannheim observes, of changing the present system: " by extending the juvenile court age to twenty-one, or by establishing separate courts for those between seventeen and twenty-one, or by somehow adopting adult court procedure to the needs of this age group." Of the three methods suggested, the establishment of separate courts is favoured. To this end, Dr. Mannheim investigates the practice of other systems, for example, New York State and Chicago, Sweden and Western Germany. There are, of course, obvious dangers in comparing legislation in different countries; but the fact that others have ventured upon specific legislation is at least comforting.

The method of treatment which seems to be favoured by the author, should such change be made, is the more effective use of probation, together with court clinics or more generally satisfactory remand homes and centres. Whether he envisages an extension of the approved school order, beyond seventeen, and of the borstal sentence, below sixteen, is not stated. However, the conclusions, or, more precisely, the recommendations, are set out with considerable regard to the practical problems which would have to be faced. Though it is not an essential part of the author's case, the reader will be finally persuaded, if he is not already, of the need for the establishment of remand centres envisaged by the Criminal Justice Act, 1948.

This booklet concludes with some observations on American courts, and here there are some useful points on the Domestic Relations Courts. In some cases these courts have jurisdiction to consider the welfare of children in a divorce case. We are now setting up machinery for handling these cases in the Divorce Division with the help of specially appointed welfare officers. This provides an interesting reflection upon the methods used in this country, which feels its way slowly, perhaps too slowly, but nevertheless effectively towards an innovation in the law and its administration.

T. E. JAMES.

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Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review,* 11 *New Fetter Lane, E.C.*4. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

THE CRIMINAL LAW REVIEW

March 1960

The drinking driver and the law

At page 152 *post* we publish an article from a Special Correspondent, who is both a lawyer and a doctor, considering the British Medical Association's recent report, *The Relation of Alcohol to Road Accidents.*

Besides presenting the results of various scientific tests which reveal that even small quantities of alcohol can cause deterioration in driving ability, the Report reveals the unsatisfactory nature, both from a medical and a legal viewpoint, of present tests for proving drunkenness for the purpose of the present offence of being " under the influence of drink . . . to such an extent as to be incapable of having proper control of the vehicle."

The report also gives a survey of " drink and driving " offences in many other countries, what evidence is accepted in the courts as proof, and what type of punishment prevails on conviction.

The report, whether or not it serves as the basis for any future legislation, is a valuable contribution to the consideration of our present law on this subject.

Traffic offences

The volume of work which devolves upon the police and the courts from minor traffic offences has led the Home Secretary to consider the introduction, before the end of the present Parliamentary Session, of two experimental measures to deal with such offences.[1]

First, he hopes to put before the House proposals for the use of traffic wardens to relieve the police of work in connection with parking and similar minor offences. Secondly, he hopes to introduce in specified areas a standard penalty system whereby persons who commit certain traffic offences will be informed by means of a ticket attached to the vehicle that they may, if they wish, pay a standard penalty to a court as an alternative to being prosecuted. A driver who wishes to deny that he has committed an offence will be able to withhold payment of the standard penalty, and will then be proceeded against in the normal way. Both experiments will be confined in the first instance to the London area.

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[1] H.C. Debates, Vol. 616, cols. 347, 348.

Police pay and conditions of service

In a recent debate in the House of Lords[2] the Lord Chief Justice, Lord Parker, and Lord Denning were among those who rose to support Lord Stonham's motion calling attention to the need for improving the conditions of service of the police. It was generally hoped by those taking part in the debate that the improvements necessary would not have to await the completion of the Royal Commission's inquiry into the police and that it would perhaps be possible for the Commission to prepare an interim report on the broad principles of pay.

As Lord Parker pointed out, the certainty of punishment is a greater deterrent than its severity, and there is no certainty when the police service is as undermanned as at present. Lord Stonham estimated the actual deficiency at 16,000; the official figure is 8,000, the deficiency based on numbers below present establishments, but the authorised establishment figures do not always, at present, reflect the requirements of the forces concerned. Another disquieting feature of the present situation is the number of inexperienced men in proportion to those with experience.

It must be faced, as Lord Citrine, whose experience as a trade unionist in industry makes him well qualified to judge, pointed out, that the advantages formerly enjoyed by the police in the way of security of tenure and pensions are now widely spread and that something must be done to make the police service again a career offering advantages over posts in industry.

The problem is an urgent one and we welcome the Royal Commission's announcement on February 17 that it hopes to complete the hearing of evidence on this aspect by the end of June and to present an interim report before the end of the year.

Prison building programme

In the Eleanor Rathbone Memorial Lecture delivered by Mr.

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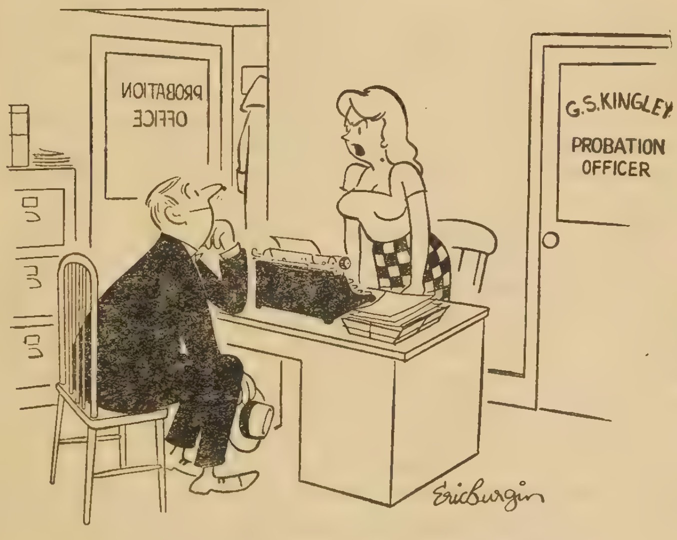
[2] H.L. Debates, Vol. 220, col. 700, January 27, 1960.

Renton at Reading University on Mr. Butler's behalf, the Home Secretary said that of the fifteen new penal institutions mentioned in last year's White Paper, " Penal Practice in A Changing Society," ten are either in operation or in the course of construction and plans are well advanced for the remaining five. The programme outlined in the White Paper included two security prisons, a psychiatric prison hospital, a remand and observation centre, a number of borstals, both secure and open, a borstal reception centre and two detention centres.

Judicial appointments

Frederick Petre Crowder, Esq., has been appointed Recorder of the Borough of Gravesend.

Joseph Arthur Grieves, Esq., Q.C., has been appointed Recorder of the City of Lincoln.



" Mr. Trivett, your probation ended eighteen months ago, will you kindly stop reporting to this office ! "

The Drinking Driver and the Law

By A Special Correspondent

Background

The Criminal Justice Act, 1925, made it an offence for a person to be " drunk while in charge on any highway or any public place of any mechanically propelled vehicle," but it was not until the Road Traffic Act of 1930 that it was officially recognised that it is not necessary to be " drunk " in the popular sense, *i.e.*, with gross inco-ordination of movements, in order to be a danger on the roads. The 1930 Act made it an offence if the person was " under the influence of drink or drug to such an extent as to be incapable of having proper control of the vehicle." In 1935 the Minister of Transport, then Mr. Leslie Hore-Belisha, invited the observations of the British Medical Association on the role which alcohol plays as a cause of road accidents " in the light of existing knowledge and experience of the medical profession." The report, which was subsequently published by a special committee of the Association pointed out that it was " highly desirable in the public interest to draw attention to the effect of amounts of alcohol commonly regarded as without deleterious effect on the driving capacity of a person in charge of motor vehicles." The special committee admitted, however, that fuller and more extensive investigation of the subject was necessary before a complete answer to the problem could be given, and there, so far as this country was concerned, the matter rested.

Meanwhile there had been considerable activity both in scientific work and new legislation in other countries. Norway introduced an offence based on the blood alcohol concentration of drivers as early as 1926. More recently there have been two international conferences on Alcohol and Road Traffic in Stockholm (1951) and Toronto (1955) and weighty pronouncements by expert committees of both the World Health Organisation and the American Medical Association. Developments have been hindered in this country by the absence, until within the last year, of any important research into the effect of alcohol on skills resembling driving or actual driving performance. Although there were many important experiments reported from foreign countries it was not until Professor Drew and Professor Cohen published their papers last year that it was possible to reach any conclusions based on work carried out in this country. It was probably for this reason that the Special Committee appointed by the Council of B.M.A. in 1951 to revise the 1935 report delayed this part of its work until now, and concentrated instead on the other half of its remit, the revision of the B.M.A. report on "Tests for Drunkenness," now published as "Recognition of Intoxication" and well known to those who practise in the criminal courts. The publication of the committee's report on the Relation of Alcohol to Road Accidents [1] has attracted considerable public interest because it has coincided with the publication of a private Member's Bill advocating the adoption of blood alcohol levels as a criterion of conviction of the drinking driver, and with the release of the number of traffic fatalities over the Christmas season when there is a customary increase in the consumption of alcoholic liquor.

Result of scientific work

The B.M.A. report deals with several sets of experiments carried out in this and other countries on skills resembling driving and actual driving performance. The agreement between these various experiments as to the deterioration in driving ability following alcohol is so striking that the committee concluded "that a concentration of 50 mg. of alcohol in 100 ml. blood while driving a motor-vehicle is the highest that can be accepted as entirely consistent with the safety of other road users." It is important to realise that this is a conclusion based on scientific work and not a positive recommendation that it should be made an offence to drive with a blood alcohol concentration in excess of this figure. The committee makes it quite clear that other considerations have to be taken into account "not least the question of liberty of the subject." The nearest it gets to a recommendation is in the final sentences of the report: "The committee wishes to emphasise that it is impressed by the evidence of the rapidity with which driving ability deteriorates even in the most hardened drinkers and in the most experienced drivers at concentrations of alcohol in the blood in excess of 100 mg./100 ml. It cannot conceive of any circumstances in which it could be considered safe for a person to drive a vehicle on the public roads with a level greater than 150 mg./100 ml." Of course the first thing the drinking driver wants to know is what does all this mean in terms of the amount he may safely drink. The Press have, naturally enough, given prominence to the figure 1½ pints of beer and 4 pints of beer which appear in the report's conversion tables as equivalent to 55 mg./100 ml. and 147 mg./100 ml. blood alcohol, respectively. It is clearly stated, however, that these tables are drawn up to determine the minimum amount of alcohol which must have been taken from a knowledge of the blood alcohol concentration, and that they must not be taken to imply the total amount drunk, *i.e.*, the tables cannot be used conversely without considerable qualification. In fact the middle 66% of the population would require at least half as much again to reach the stated levels, and many people would require at least twice as much.

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[1] *Relation of Alcohol to Road Accidents* (1960), British Medical Association. (price 2s. 6d.), London.

Medical limitations

Perhaps the most disturbing part of the report to the practising lawyer is the committee's conclusions on the value of physical clinical examination as a method of determining whether a person is fit to drive. Experiments have shown that there is a wide measure of disagreement between doctors both as to the findings in examination of the driver, and in the conclusions to be drawn from those findings. This, the committee is careful to point out, reflects no discredit on the doctors concerned. " The available tests in the physical examination for assessing impairment of driving ability are, however, relatively unreliable, and the majority are not sensitive enough to indicate when the concentration of alcohol in the blood has reached a level at which direct tests of driving ability would reveal impairment to be present." This conclusion is supported by some startling facts. In one experiment none of the subjects showed any sign of impaired co-ordination in tests such as shuffling of cards, walking, standing, or writing on the blackboard with chalk, when their blood alcohol concentrations were between 30 mg. and 90 mg./100 ml. At between 100 mg. and 170 mg./100 ml. only two subjects showed slight impairment in these tests. However at 100 mg./100 ml. their driving performance had decreased by 15% and at 150 mg./100 ml. by 30%. This particular experiment was concerned largely with reaction time to traffic signals, etc. It follows that the capacity to deal with a crisis may be reduced by as much as 30% without any clinical finding of impairment due to alcohol. The significance of this in respect to braking distance alone need not be emphasised.

The report mentions one case in which the police surgeon found a man sober whereas his blood alcohol concentration was later found to have been 257 mg./100 ml. (requiring a consumption of at least 14 whiskies in an 11-stone man). In another case a driver was found " not sober " by the police doctor although his blood was later found to have contained no alcohol. Nervousness in the test situation was thought to have been the cause. The report also mentions the well-known temporary " sobering up " effect whereby the suspect is jolted back to apparent normality for a short time by the realisation of his position and may even be able to pass a physical examination. Cases have been known of such persons collapsing immediately after the examination and being removed from the police station on a stretcher. Finally the report emphasises that many accidents attributed to the effect of alcohol occur late at night when there may be difficulty and delay in getting a doctor, by which time the driver may have sobered up. Facilities available in police stations are often unsatisfactory for carrying out examinations of this kind, nor is late night or early morning a favourable time for conducting tests on co-ordination. This section of the report implies a formidable case for the adoption of blood alcohol tests. Indeed the committee quotes a Norwegian doctor with long experience of these cases who stated " it is nearly inconceivable ever to go back to the old system of basing the diagnosis of sober or not sober solely upon the clinical examination." This is supported by the finding of the expert committee on Alcohol of the World Health Organisation which concluded that " . . . clinical methods cannot be relied upon as the only means of deciding whether a person is under the influence of alcohol." At the same time the committee emphasised that physical medical examination must remain an essential part of charging of a drinking driver in order to exclude the presence of injury or disease. It is well known that symptoms of head injury mimic those of alcoholic intoxication, and it is important also to exclude other conditions such as diabetic coma. Furthermore alcohol aggravates the effect of head injury through its effect on the cerebro-spinal fluid and tendency to haemorrhage.

Legal limitations

The B.M.A. report discusses briefly the various legal difficulties in obtaining a conviction for the present offence, and blames primarily the confusion " present even in the minds of the police, counsel and the bench " as to the scope of the present offence. The concept of " drunk in charge " under the 1925 Act has died a hard death and a person is unlikely to be found guilty of being " incapable of having proper control " unless he has shown gross inco-ordination. 84% of those drivers found unfit to drive in a survey carried out in South Western England had blood alcohol concentrations between 150 mg./100 ml. and 300 mg./100 ml. with a mean of 220 mg./100 ml. Tests on actual driving performance have shown that even the most hardened drinkers and experienced drivers are seriously affected below 150 mg./100 ml., and there is some 30% impairment in reaction time by time 150 mg./100 ml. is reached. Yet impairment of this degree is almost certain of escaping conviction on the existing offence. The ease with which medical evidence in these cases is discredited by experienced counsel often raises a " reasonable doubt " in the minds of juries which are notoriously sympathetic to the driver who has had only a few drinks. The committee points out that whereas 91% of offences dealt with summarily in magistrates' courts resulted in convictions in 1957, only 48% were convicted at courts of quarter sessions or assize. On a five-year average in Lancashire only 37% were convicted by juries compared with over 90% by magistrates. The committee reaches the conclusion that " The existing legislation does not come into effective operation until a very much higher concentration of alcohol in the tissues has been reached and is unsuccessful as a measure to prevent accidents caused by alcohol."

Statistical evidence

So far as this country is concerned the statistical evidence of the relation of alcohol to road accidents is the weakest link in the chain. Controlled series from other countries based on comparison of the concentration of alcohol in the blood of drivers injured or killed in accidents with other drivers passing the accident at the same time show quite clearly both the relationship and the concentration of alcohol in the blood at which the hazard can be shown to exist. Unfortunately, owing to the primitive state of the coroner's inquest in many parts of this country, blood or brain alcohol estimations are not routinely carried out on traffic fatalities. In fact in many cases one is forced to the conclusion that the cause of the accident is arrived at by guesswork. Furthermore the evidence of other countries is that a considerable proportion of pedestrians fatally injured in traffic accidents have taken alcohol. 30% of pedestrians killed in traffic accidents in Baltimore between 1951 and 1956 had blood alcohol concentrations of more than 150 mg./100 ml. and 43% had blood alcohol concentrations of more than 100 mg./100 ml. in Perth, Western Australia, during the same period. There is no information on this point from this country. In order to exclude such factors a survey was carried out in Westchester County, New York, on those drivers killed in single vehicle accidents, *i.e.*, in which no other driver or pedestrian was involved. It was found that approximately half the drivers had blood alcohol concentrations of 150 mg./100 ml. or more. The committee quotes official figures of personal injury accidents in this country which show that in 1954 2·1% of all fatalities and

0·9% of all casualties were due at least partly to the influence of drink or drugs, and compares this with the findings of Miss Jeffcoate in her survey of 376 fatal accident cases in three police districts. Miss Jeffcoate found that in 17% of all accidents and 62% of accidents after 10 p.m., someone involved had been drinking alcohol. Supported by the views of independent police surgeons the committee concluded that " the official returns for accidents caused by drivers who have taken alcohol underestimate very considerably the number of accidents due to this cause."

Practice in other countries

In a most interesting appendix to the report the committee sets out information which it obtained from the national medical associations of other countries. This information is classified into whether or not physical examination of suspects is required and whether such evidence is admitted; whether a bio-chemical test is carried out and what concentration is accepted as evidence of impairment; and the maximum penalty on conviction. The committee compares the preventive effect of the English offence with that of an offence based on the concentration of alcohol in the blood, and quotes examples of the decline in accidents and fatalities which have resulted following the adoption of such legislation. Problems of enforcement where the offence is based on biochemical tests are discussed and the " implied consent " laws introduced in some American states are considered. Under such a law any person who takes out a driving licence is taken to agree to consent to a biochemical estimation of alcohol in the blood at any time when a police officer has reasonable ground to suspect him of intoxication while driving his car. Refusal to comply leads to revocation of the licence. Difficulty has been experienced in administering such laws in the United States owing to the constitutional position with regard to incriminating evidence. Legislation in this country, however, is not fettered by a fixed constitution and such difficulties are unlikely to arise here.

Finally, compulsory subjection to a blood test does involve some invasion of the person and is not likely to be readily accepted by parliament. Accordingly the B.M.A. committee reports that an apparatus is now available for taking samples of breath from which the concentration of alcohol in the tissues can be rapidly and accurately estimated. This is the " Breathalyser " which has received so much publicity in recent weeks. Whereas blood tests require the presence of a doctor and can be carried out only in suitable conditions, a breath test could be carried out by any suitably trained police officer at the roadside, thereby eliminating delay during which the blood alcohol concentration will continue to fall. Of course in cases where there is a delay between arrest of the offender and the incident which gave rise to suspicion, the offender can invalidate a subsequent biochemical test by taking more alcohol. Norway countered this practice by a law introduced last August which made it an offence for a driver to taste alcohol within six hours after ceasing to drive if he has reason to believe that his driving may be subject to police investigation, *i.e.*, if involved in an accident in Norway it is an offence to take alcohol within six hours unless a biochemical sample has already been taken. In Sweden a very simple form of breath-testing apparatus is used by the police at the roadside. If this gives an indication that the driver's blood alcohol concentration may be in excess of 50 mg./100 ml. the driver is taken immediately by police car to the nearest properly equipped police station where a specimen of blood is taken so that the concentration of alcohol actually present in the blood can be determined.

What is the solution to the problem of the drinking driver ?

The B.M.A. report shows clearly that the main problem is the driver who has had sufficient alcohol to cause serious impairment of his driving ability. This is a far more serious problem than the driver who has drunk so much as to be grossly inco-ordinated. His condition is quite apparent and if not stopped from driving by his friends his erratic performance on the road will be clearly obvious to other drivers and the police. It is interesting to note that several countries have adopted two offences in relation to the drinking driver. The first is driving while intoxicated, for which conviction is dependent upon medical proof following physical examination, supported, if necessary, by proof of the existence of a relatively high blood alcohol concentration. The second is driving while impaired, for which conviction is dependent upon proof that the blood alcohol concentration is in excess of a certain level, irrespective of the presence or absence of signs of intoxication on physical examination. Where blood alcohol concentrations are used as the basis for conviction there is a considerable variation between the various countries. 50 mg./100 ml. has been adopted by Iceland, Norway and Sweden; 75 mg./100 ml. by Finland; 100 mg./100 ml. by Denmark and Switzerland; and 150 mg./100 ml. by Austria, Belgium and Western Germany, the latter accepting a slightly lower figure (130 mg./100 ml.) in the case of motor-cyclists. The B.M.A. report makes the important point that there is no concentration at which driving ability can be shown to fall off suddenly as deterioration is directly proportional to the amount drunk. Accordingly the figure would have to be fixed empirically in the event of legislation being introduced. The B.M.A. report includes in an appendix a list of empirical standards already adopted in regulations affecting motor drivers and vehicles, of which the speed limit is the obvious example. The maximum penalties which are imposed on conviction in the various countries are of considerable interest and show much variation. The B.M.A. report points out that in this country the offender is normally an otherwise law-abiding citizen and that the social stigma of conviction is such that the person charged will often agree to plead guilty to the offence of driving dangerously, an offence which carries a much heavier penalty on indictment, if the drink charge is dropped. In many respects the drinking driver is a unique offender. Neither fines nor terms of imprisonment are likely to be effective or appropriate in such cases. The logical answer is disqualification from driving which is widely used in many countries. In Norway, which adopts a blood alcohol level as low as 50 mg./100 ml. the offender is automatically disqualified for a year, and for life if he is convicted a second time. In a few countries disqualification is the only penalty and the inefficacy of both fines and terms of imprisonment have been recognised. However in some states of America the convicted offender is automatically sentenced to a short term of imprisonment even for the first offence, *e.g.*, West Virginia (24 hours), Ohio and Texas (3 days) and Oklahoma (10 days), and in Sweden imprisonment for a very much longer period is virtually mandatory if the driver's blood alcohol is found to be in excess of 150 mg./100 ml. This practice is said to have a salutary effect.

Whether or not the B.M.A. report will be used as a basis for legislation, it has served an extremely useful purpose in publicising the effect that even small quantities of alcohol have on driving performance. No one reading the report can fail to be impressed by the very serious errors made by drivers with relatively low blood alcohol concentrations while expressing every confidence and satisfaction in their performances.

Prosecuting Officer

By Christopher Williams

Police notebooks

Everything all right so far, thought Newman to himself, as P.C. Brewer took the oath in an unhurried monotone. The girl had done very well in the box for a twelve-year-old. She'd given her answers firmly and confidently, though it had been a pity she'd not been able to swear to the identity of the prisoner in the dock. Still, she'd said she *thought* it was the same man, and of course Brewer and Boots would prove she'd had no doubt about it at the time of the arrest, which was what really mattered.

" Now, then, Brewer," he began. " Were you on duty in the Victoria Gardens, Smallport, on the afternoon of Saturday, the sixth of February? "

" Yes, your Worships," replied Brewer. " I was on duty in plain clothes, in company with P.C. Boots, who was also in plain clothes. We were keeping observation in the vicinity of the children's playground. At about half-past one in the afternoon, I saw the prisoner approach the playground, and sit down on a bench near the swings."

Brewer glanced at the dreary elderly man in the seedy raincoat standing—drooping, rather—in the dock. The man's pale and watery eyes fell before Brewer's dispassionate gaze.

" P.C. Boots and I retired into the shrubbery about five yards behind the bench on which the prisoner was sitting," Brewer went on. " There were two young girls, about twelve years of age, using the swings. The prisoner sat watching them. Then. . . . "

" Just a moment, Brewer," interrupted Newman. " You have told their Worships that you and Boots were five yards behind the prisoner. How far in front of the prisoner were the girls? "

" They were another five yards in front of the prisoner, your Worships," replied Brewer. " We were more or less in a straight line, so the girls were about ten yards from Boots and myself."

" Right, Brewer," said Newman. " Now tell the court how the prisoner was dressed."

" As he is now, your Worships," replied Brewer. " His raincoat was buttoned up, and his hands were in the pockets of it. After he had been there two or three minutes, another young girl came up to the swings. It was the previous witness, your Worships.

She'd made a complaint to P.C. Boots about half-an-hour earlier, about the prisoner's conduct. She went up to the girls on the swings and said. . . . "

But Mr. Pobjoy had already heaved himself to his feet, and was holding up a warning white hand. " Now, really, you know, this won't do. Surely we've been into this all before, when the girl who made this allegation was in the box just now. In the first place, we cannot hear P.C. Brewer on the subject of a complaint made in his absence by anyone to anyone else. Then, in the second place, the court in its wisdom has already decided that what the complainant said to her companions at the swings cannot be admitted, because it was not sufficiently in the presence and hearing of the prisoner. The last witness herself said she didn't think the prisoner could hear what she said." And down he sat, with the air of one who had once more stemmed the tides of tyranny.

The Chairman leaned forward over the edge of the bench, like a rotund ewer, and poured a thin stream of whispered words into the upturned ear of the learned Clerk. The Clerk nodded, and turned to Inspector Newman.

" Yes, Inspector? " he said, with an air of invitation.

" As to the question of the complaint, your Worships," he said, " surely it would be rather artificial for the officer to pretend not to know why he, a uniform officer, was doing duty in plain clothes in a park, where he normally would have no business. He was doing that work there because of a complaint of misconduct; and it was within his knowledge that both the prisoner and the last witness were involved in the complaint, so I cannot see that the prisoner's interests are really affected at all. However, I am sure that the officer now realises that it would have been better if he had left it to the next witness to deal with that question.

" But as to the suggestion, now repeated, that the prisoner was too far from the girls for what they said to be regarded as having been said in the presence and hearing of the prisoner, I must still respectfully disagree. Your Worships will recall that the previous witness, the complainant, could not say just how far she was from the prisoner when she came up to the swings. Her words were, I believe, ' quite a way.' It was that fact that led to your decision at the time. But now Constable Brewer has told the court that the prisoner was only five yards from the girls, and that he and his colleague were ten yards from the girls. He was about to tell the court what it was that the complainant said to her companions, so it is clear that *he* could hear the words. But if he could hear them, then surely the prisoner, who was only half the distance away, could hear them even more clearly. That is to say, the words were spoken in the presence and hearing of the prisoner, and I therefore submit that they are admissible."

The Clerk glanced towards Mr. Pobjoy, who waved a hand, as much as to say, I have done my best for freedom.

"Continue, Inspector," said the Chairman.

"Now, Brewer," said Newman. "Please go on."

"The girl, your Worships, said: 'Watch out, Madge, that dirty old man pulled his thing out at me.' As she said this, she pointed to the prisoner sitting on the bench. Then she went on: 'I told Mr. Boots about it.' At that moment, P.C. Boots made a remark, and the prisoner turned round and saw us. He began to run away, but I went after him and brought him back. The complainant then said: 'That's him. I was in the shelter by the boat house, reading my comic, when he came and stood right in front of me and pulled his thing out and told me to look. I ran away and found the policeman.' Then the prisoner said: 'I only went in to relieve myself.' I then told the prisoner I was arresting him, and cautioned him. He made no reply."

Brewer then wound up his evidence, and waited stolidly for whatever Mr. Pobjoy might have in store for him. Mr. Pobjoy manoeuvred himself into position for attack, like a dreadnought in a heavy sea.

"Now, officer," he began, giving his glasses a flourish. "You have given the court what appears to be a very precise account of where you, the complainant, and my client were, and also of what was said, though you yourself seem to have been deeply ensconced in the shrubbery—so deeply, indeed, that your presence was not discovered until your colleague made what you have called a 'remark.' I will be coming back to this 'remark' in a moment or two, but just now I want you to tell the court just why you are so sure that your account is accurate. I put it to you, officer, that what the complainant said was not '*that* man,' but simply '*a* man.'"

"No, your Worships," replied Brewer. "She definitely said 'that man,' and pointed to the prisoner."

"But, officer, how can you be sure?" asked Pobjoy persuasively.

"Because I could hear distinctly, your Worships," replied Brewer. "And also because I made a note in my pocket book very soon afterwards."

"Really?" said Pobjoy. "Yet I have not seen you refer to these famous notes this morning. Do they exist, excepting in your imagination?"

Brewer began unbuttoning his breast pocket, but Inspector Newman gestured him to stop. Rising to his feet, he felt a sense of irritation at this demand. The usual last resource of the indifferent advocate, trying to make the best of a hopeless case, he thought—go for the officer's pocket book.

" Your Worships," he began. " I must, with the greatest respect, protest. P.C. Brewer has made no reference to his pocket book in his evidence. He has not refreshed his memory from it. His memory of what happened barely a week ago is perfectly fresh, and he has spoken from his memory. Surely, in such circumstances, his pocket book is not to be called for in this way."

He paused, and opened his copy of *Stone's*. There was something about that somewhere, he felt sure. Meanwhile, the Clerk looked across at Pobjoy and was about to speak, when Newman went on. " I would refer your Worships to a footnote marked (a) on page 345 of the 1959 edition of Stone's *Justices' Manual*. You will see that it says this: ' If a police officer gives evidence without using or referring to his notes, the defence cannot call for their production (*Hinshelwood* v. *Auld*, 1929 S.C.(J.) 4).' "

As the Inspector sat down, the Chairman whispered something to the Clerk, who nodded. " Well, then, Mr. Pobjoy," he said, " unless you have any suggestions to make, the matter would perhaps best be left where it is. Pray continue."

Pobjoy half bowed in the direction of the Chairman, at the same time shooting a sideways glare at the Inspector.

" Now, officer," he began. " You have said you arrested my client. What power were you acting under in doing so? Had you witnessed any offence under the section with which my client is charged; that is to say, under section 4 of the Vagrancy Act of 1824? Eh, officer? "

" Not to say witnessed, your Worships," Brewer was beginning, when the Clerk silenced him with a gesture, and turned to speak to the Chairman, who nodded once or twice. Then the Chairman turned to Mr. Pobjoy.

" Mr. Pobjoy," he said, " we do not wish to interfere with any line of questioning you may feel will help us to establish your client's innocence of the offence of which he is charged. But at the same time I would point out that your client has accepted the jurisdiction of this court, and so we are solely concerned with his guilt or innocence. Any question as to the propriety of the means by which he has come before us—in other words, the legality of his arrest—is a matter for discussion elsewhere, if you wish to take it up."

"If you please," replied Pobjoy. "I won't pursue the matter for the present. Now, officer," he went on, turning to Brewer once again, "you have told us that my client hurried off because your colleague made what you have called a 'remark.' What was that remark?"

"It was more an exclamation, your Worships, than a remark," replied Brewer. "And I did not say the prisoner ran away *because* Boots made it, but simply *when* he made it. He ran away because the girl said what she did, and he saw us. I concluded that an innocent man would not have run away, so I went after him."

Pobjoy sat down hurriedly, and waved Brewer out of the box.

"P.C. Boots," called Inspector Newman. Boots stepped smartly into view, and paused as he met Brewer. Brewer handed him a black-covered pocket book. This was done quite openly, but Pobjoy's attention was directed towards the coat-of-arms above the Chairman's head, as though to assure its royal owner that she need not look in vain to him for support. Boots took the oath, and briskly entered into his evidence. He told how he had been approached in Victoria Gardens by a young girl, who had seemed distressed, and who had something to tell him. Boots was just about to recite what the girl said, when Pobjoy was on his feet again.

"I am sure the officer means well," he said, "but how can the girl's words be admitted? They were not said in the presence and hearing of my client, you know."

The Clerk looked across at Newman, and said: "Yes, Inspector?"

"Your Worships," replied Newman, "I suggest that what the girl said to this officer is to be regarded as a recent complaint. Such complaints after sexual offences are not, of course, evidence of the facts complained of, but they do serve to prove consistency of the complainant's conduct with the evidence she gives to the court."

"Perhaps the Inspector would tell the court," began Pobjoy, with a smile that seemed to forgive all, "just what the complainant's conduct has to do with this case. The charge is indecent exposure —an offence in which the insulted female plays no part whatever. May I remind the Inspector that evidence of recent complaint is restricted to 'rape and and kindred offences,' if I also may quote *Stone's*. The Inspector cannot hope to extend its use indefinitely, to cover such cases as the present one."

Newman swallowed. He could be right, at that, he mused. Something to look into, anyway. Meanwhile the Clerk had turned and was whispering to the Chairman, who nodded and said: "Officer, you need not go into what the girl said to you."

Boots went on with his story as though nothing had happened. Unlike the watchers in *Susanna and the Elders,* his version of what he saw and heard from his concealment was identical with that of his colleague. Glancing once or twice at the open pages of the pocket book, he told of the girl's denunciation, and of the prisoner's reply. As he came to an end, Newman sat down, and Pobjoy began his cross-examination.

"Now, then, officer," he said. "You have given a very precise account of what was said and done. Would it surprise you to hear that your version is identical with that of P.C. Brewer?"

"No, your Worships," replied Boots.

"But how does that come about, officer?" asked Pobjoy, glancing along the row of magistrates, as much as to say, watch this now. "Do you mean to tell the court that you have been discussing the details of evidence with your colleague?"

"Yes, your Worships," replied Boots. "As soon as the prisoner was charged at the station, we talked it over, while the notes were being made."

"And those are the notes that your are holding, officer, are they?" asked Pobjoy. "Perhaps I might have a look at them, since you have been referring to them." He glared at Newman, and held out his hand patiently.

Boots picked up a wire paper clip from the ledge in front of him, and clipped the front pages together, before handing the book to Pobjoy.

"I have pinned the earlier pages together, your Worships," he said. "They have nothing to do with my evidence in this case. The notes for this case start at the top of the exposed left-hand page and go half-way down the opposite page."

Pobjoy seized the book eagerly and started feasting his eyes on it. Suddenly consternation spread over his heavy features, and he turned the book over, to examine the front cover. He looked up at Boots.

"Officer," he said sternly. Whose book is this?"

"P.C. Brewer's, your Worships," replied Boots.

"And whose hand wrote these notes?" Pobjoy asked.

"Brewer's, your Worships." replied Boots.

"Then where are your own notes, officer?" asked Pobjoy.

"I never made any, your Worships, began Boots. "I. . . ."

"Do you mean to tell us, officer," interrupted Pobjoy, in a voice of thunder, "that, not content with collaborating with your colleague in preparing the notes of your evidence, you proceed to refresh your memory, as I have no doubt you would put it, from someone else's notes? How does this come about, eh? "

"I was about to explain, your Worships," said Boots, "that at the time I had burned my right hand, and was unable to do any writing. As the senior constable, I told Brewer to make the notes. I was there when he did so, and was satisfied they were accurate."

Pobjoy glared at the Chairman and his colleagues, as much as to say, how's *that* for duplicity! Then he addressed the Bench:

"This seems a highly irregular procedure from beginning to end. It will be most interesting to hear what this officer's superiors will have to say about this, when they hear about it. Meanwhile, I do not see how the evidence he has to offer can be listened to at all." And he sat down, wiping Boots out of existence with a sweep of his hand, as though he were no more than a figure on a blackboard.

The Clerk had been whispering with the Chairman during these observations, and then he turned to Newman.

"Their Worships would like to hear your comments, Inspector," he said.

Newman got to his feet. "As to the point about collaboration between the two police officers when preparing their notes, surely there is nothing necessarily wrong about that, your Worships. Mr. Justice Byrne said, in the case of *R.* v. *Bass*,[1] that nothing could be more natural and proper when two persons have been present at some transaction than that they should afterwards make sure that they have a correct version of what was said.

" As to P.C. Brewer writing the notes, and Boots referring to them, that, too, seems perfectly proper in the circumstances. Boots saw them being written, and approved them at the time, so surely he is as entitled to refresh his memory from them as he would be if he had written them himself. Indeed, Lord Justice Devlin, in a recent book,[2] actually mentions, with approval, a case in which the trial judge told the jury that he could see nothing wrong in such a practice.[3] So I do suggest, your Worships, that there is nothing wrong here at all. The point that really matters is, does the witness speak the truth from his own memory? "

As Newman sat down, Pobjoy glared ferociously at him. Once again the Clerk raised his eyebrows interrogatively, but Pobjoy shrugged his shoulders. After a brief conference with the Clerk, the Chairman said: "Perhaps, then, Mr. Pobjoy, you would proceed with your cross-examination."

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[1] (1953) 37 Cr.App.R. 51.

[2] *The Criminal Prosecution in England*, p. 42.

[3] *R.* v. *Adams* (1957) unreported.

"Very well. Now then, officer, attend to me," said Pobjoy. Newman, wondering what Pobjoy could find to work on, was conscious of a vague feeling of having forgotten something, something vital. Just what it was, however, he could not think. Uneasily, he listened to Pobjoy's booming periods.

"Now, think, officer," he was saying. "I put it to you that the whole thing was little more than guess-work on your part, that there was no real connection between the man complained about and my client. Just look at him—nothing very distinguished about him, after all, is there?"

Pobjoy was in the act of turning round with outstretched arm, to display to better advantage the anonymity of his client, when his client spoke.

"My lord," he wheezed, "I wishes to plead I did it. I've changed my mind. Guilty, my lord," he finished with a gasp. Pobjoy stared at him for a moment, as though his ears had deceived him. Then he turned to the Chairman, and said: "In that case. . . ." He sat down, and began to collect his papers together, too overcome to attempt to offer mitigation.

Five minutes later, as the court room emptied, he leaned towards Newman affably. "You know, Inspector, I quite enjoyed all that. Give and take, you know, give and take. But for my respected client's sudden change of heart, I think we'd have had you. Corroboration, you know—corroboration; not a sign of it—very weak with no corroboration, eh?"

Instantly Newman's memory jerked into action. Yes, that was it, he mused. The only corroboration was the prisoner's words "I only went in to relieve myself." Not very strong anyway, but practically useless once he'd forgotten to refer to them and their function in his opening. Just the chance old Pobjoy'd jump at at the end of the case for the prosecution. Still, it hadn't mattered after all. But a point worth watching. Now then, he thought, he must get down to this business about recent complaints. Perhaps he'd better have a word with the Superintendent, he mused, as he made his way out of the door.

Towards the Deodand

By J. W. CECIL TURNER

[*continued from p. 97, ante*]

B. Kensington Borough Council v. Walters [38]

The purpose of what follows is to examine the decision in this case and the argument of the court upon which that decision was reached. It will be of assistance to consider first four older cases.

(i) *River Wear Commissioners* v. *Adamson* [39]

In this case the defendant's ship was driven on shore by a storm; the crew were taken off and the ship, a complete wreck, was then driven by winds and waves against the pier belonging to the harbour and did damage to it. In an action under section 74 of the Harbours, Docks and Piers Clauses Act, 1847, which enacts

> " The owner of every vessel or float of timber shall be answerable to the undertakers for any damage by such vessel or float, or by any person employed about the same, to the harbour, dock, or pier, or to the quays or works connected therewith, and the master or person having the charge of such vessel or float of timber, through whose wilful act or negligence any such damage is done, shall also be liable to make good the same. . . ." [40]

a verdict was entered for the plaintiffs for an amount subsequently assessed at £2,825. In reversing this judgment the following dicta were enunciated by Jessel M.R. at p. 549:

> " It is . . . indubitable that a more literal construction would, on a consideration of the nature and objects of the statute, lead one to the conclusion that in every case the owner of the vessel was to be liable for any damage done by his vessel to the harbour, dock, or pier. But the consequences to which such a construction would lead are so startling that I think we must consider that they would not have been in the contemplation of the legislature. . . . If the vessel were driven against the pier by the undertakers themselves, so that it was their wrongful act which caused the vessel to be driven against the pier, the damage would still be done by such vessel. So that . . . the person who did the act might make the person who was wholly innocent pay for the damage done by such wrongful act. . . . The vessel might be taken by the Queen's enemies . . . and used either as a battering ram or otherwise against

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[38] [1959] 3 W.L.R. 945.

[39] (1877) 1 Q.B.D. 546; (1877) 2 App.Cas. 743.

[40] The statute speaks of damage done by an *inanimate* object, *i.e.*, " *vessel or float of timber*," *not* by any *person*.

> the pier, and then, being re-captured, the unfortunate owner . . . would be liable. A great number of other cases equally startling might be put as the result of construing the section literally. If that construction leads to so absurd and revolting a conclusion, then, if it is capable of any other fair interpretation, I think it is the duty of a court of construction so to read the section."

As above indicated the court dismissed the appeal. The case was carried up to the House of Lords where their lordships, with one dissentient, affirmed the judgment of the Court of Appeal, Lord Blackburn saying[41]:

> "My Lords, the common law is, I think, as follows:
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> "Property adjoining to a spot on which the public have a right to carry on traffic, is liable to be injured by that traffic. In this respect there is no difference between a shop, the railings or windows of which may be broken by a carriage on the road, and a pier adjoining to a harbour or a navigable river or the sea, which is liable to be injured by a ship. In either case the owner of the injured property must bear his own loss, unless he can establish that some other person is in fault, and liable to make it good. . . . He does establish such a liability against any person who either wilfully did the damage, or neglected that duty which the law casts upon those in charge of a carriage on land . . . to take reasonable care and use reasonable skill to prevent it from doing injury and that this wilfulness or neglect caused the damage. . . . Where no one is to blame, as where the accident is occasioned by inevitable accident, the loss at common law is borne by the owner of the property injured. . . . My Lords, reading the words of the enactment . . . it seems to me that the object of the legislature was to give the owners of harbours, docks, and piers more protection than they had . . . [p. 768]. It seems to have occurred to those who framed the statute, that in most cases where an accident occurs, it is from the fault of those managing the ship—and in most cases those are the servants of the owners—but that these were matters which in every case must be proved, and consequently that there was a great deal of litigation incurred before the owner, though he really was liable, could be fixed; and with a view to meet this, the remedy proposed was that the owner, who was generally really liable (though it was difficult and expensive to prove it) should be liable without proof either that there was negligence, or that the person guilty of neglect was the owner's servant, or proving how the mischief happened . . . [p. 769]. As to the cases in which the fault was that of some person not able to make compensation, for whom the shipowner was not at common law responsible, it may have been thought that the cases would occur so seldom, or when they occurred would probably be of such small amount, that the shifting of the loss from the owner of the property to the owner of the ship was not too high a price to pay for the saving of litigation and expense. The cases of a common misfortune befalling both ship and pier, without fault of either, seem not to have been thought of . . . [p. 770]. It is quite true that

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[41] (1877) 2 A.C. at p. 767.

> where a duty is imposed by law, if the performance of the duty is rendered impossible by the act of God, or the king's enemies, the non-performance of the duty is excused. . . . The case of *Paradine* v. *Jane*[42] was one in which . . . the really important part of the decision is that where a contract is made which does not expressly or impliedly except the act of God, the courts could not introduce that exception by intendment of law; and that makes strongly against the supposition that, in construing a statute where the legislature might have expressed, but did not express, such an exception, the court should introduce it. . . . Still there remains the question whether the hardship produced, and the injustice worked, is so great as to justify the court in putting any meaning on the words which they will bear in order to avoid it . . . [p. 772]. In the present case I feel no doubt that the hardship is great enough to justify putting a considerable strain on the words to avoid it; for I feel certain that if the enactment has the effect of shifting the burden of a misfortune to the piers from the owners of the property, who at common law would have borne it, to the owners of the ship, who are free from all blame, it is an unforeseen consequence of the words used, which words, if the consequence had been foreseen, would not have been used in the enactment."[43]

For the purposes of the present discussion the salient points in the above case are:

(1) That the statute, on the face of the words used in section 74, created an "absolute" liability on the owner of a vessel which should come in contact with and cause damage to the pier.

(2) Where, however, the words of the statute (*a*) modify the common law and (*b*) if strictly applied would produce great hardship and injustice the court is justified in putting any meaning on the words which they will bear in order to avoid such consequences.

(ii) *Harding* v. *Barker*.[44]

The Metropolis Local Management Act, 1855, provides by section 206:

> "If any person wilfully take away, break, throw down, or damage any lamp set up for lighting any of the streets in any parish mentioned in either of the Schedules (A) and (B) to this Act . . . or damage the iron or other furniture thereof, [or wilfully damage any other property vested in any vestry or district board, or any property vested in the said Metropolitan Board][45] . . . and if the party accused be convicted of such offence he shall forfeit

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[42] (1647) Alleyn 26.

[43] The judgments in the case of *Adamson* were elaborately discussed by the House of Lords in *Great Western Ry.* v. *Owners of s.s. Mostyn* [1928] A.C. 57.

[44] (1888) 53 J.P. 308.

> the sum of forty shillings and shall also pay to such vestry or board the amount of damage done."

and by section 207:

> "In case any person carelessly or accidentally . . . damage any such lamp, or the iron or other furniture thereof [or other such property as aforesaid] [45] he shall pay the amount of damage done."

On a complaint under section 207 of the above Act, preferred by Harding, clerk to the vestry of the parish concerned, against Barker and Barker for the amount of damage done to a street lamp as the result of a collision with it by a van driven by their employee G., the justices found that no negligence or carelessness was shown on the part of G. and that the act complained of was an accidental one, and accordingly dismissed the complaint. It appeared that the employer Barker was not present on the occasion when G. was driving their van loaded with baskets which fouled and damaged a lamp set up so as to overhang the curb of the footway by 5½ inches. On appeal by way of case stated counsel for the appellant Harding submitted that this was treated in the statute as a matter of civil liability and that therefore the master, since the servant was acting within the terms of his employment, was to be held responsible. He argued that the object of the Act was to secure the vestry against this class of accidents and that it could never have been the intention to confine the remedy to the servant, who is usually a man of straw. Counsel for the respondent was not called upon. In delivering judgment for the respondents Field J. said:

> "I think this is a very plain case. . . . The Act provides, no doubt, a speedy remedy for an act of this description. The 206th section provides for wilful damage to these street lamps, and the 207th section deals with careless or accidental damage. What is stated there is not strictly a penalty, but the amount, whatever it was, could be recoverable under the Summary Jurisdiction Acts, and, of course, if the amount was not paid, and there was no means of recovery by distress, the result might be that the defendant might have to go to prison. The words, no doubt, are somewhat ambiguous. It is clear that it was for the justices to find whether the damage was done accidentally or not. Here the justices find that there was no negligence on the part of the driver, but that it was a mere accident. It is plain that the master did not do the damage and he is not liable for acts done not within the scope of the servant's employment; and thus he was held not to be liable, in the case of *The General Omnibus Co.* v. *Limpus*, 1 H. & C. 526, where the driver of an omnibus thought fit to wilfully obstruct a rival omnibus, and it was held to be misdirection to tell a jury

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[45] The words in brackets were repealed by the London Government Act, 1939, s. 207, Sch. 8.

> he would be liable if the act was done for the master's benefit.[46] Here it could not be suggested that this act was done even for the master's benefit. I think the justices were right."

Wills J. said:

> "I think the 207th section does not relate to anybody but the person who is actually doing the careless act. But here it was not even a careless act, for the justices found that it was a mere accident. Therefore there is no satisfactory ground for holding that the master here would be liable. If we were so to hold, we would be deciding against this very statute."

It will be observed that this case was argued, and treated by the court, as turning on the one point of whether or not the employers could be held liable under the statute for damage done by the driving of their van by their servant. Counsel for the appellant was in effect arguing that the common law rule as to employer's liability was intended to be enforced in a summary manner by way of complaint before justices. Field J. agreed on the point of procedure[47]; he indicated that the section did provide something in the nature of a penalty but went on to treat the case as though it were grounded in tort and to test the facts by the common law rules as to employer's liability. Apart from procedure there is nothing whatever in the report even to suggest that anyone engaged in the case contemplated that the section could be interpreted as enlarging the common law. Wills J. took the view that the statute did modify the common law but only by way of limitation and not by way of extension, regarding the words of the section as excluding employer's liability; and his words seem to mean that the person who actually brought about the collision would not be liable for "a mere accident" but only if he had been guilty of "a careless act."

(iii) *Burgess* v. *Morris*[48]

Case stated. This was an appeal against the dismissal of a complaint preferred under section 207 of the Metropolis Local Management Act, 1855, by Burgess, the surveyor of the vestry concerned, claiming payment of the damage done to a street lamp. It appeared that the vestry had installed in the footway at the side of a considerably cambered road a lamp post at such an angle from the perpendicular that it projected a certain distance over the roadway, which was bounded by a granite channel. Morris was driving an omnibus along this road when his horses swerved close to the kerb and as he steered them back into their former course the rail of the omnibus (which had been tilted by the road camber) struck the lamp and damaged it to the value of £2 odd. The magistrate held that there was no negligence on the part of Morris, that under the circumstances the lamp was in an improper and unsafe position and that the damage was really caused thereby and that no liability attached to the respondent. He accordingly dismissed the complaint. In the Court of Queen's Bench the argument of counsel for the appellant was to the effect that since the magistrate had found that the damage was not wilful, and that it was not owing to the negligence of the respondent, therefore it must be accidental and accordingly within section 207. But then he went on to say: "The magistrate was wrong in thinking the formation of the road excused the carelessness of the driver." Lush, for the respondent, equated carelessness with negligence and said that there were only three positions under the statute, namely, (1) wilfulness, (2) carelessness, and (3) pure accident. He argued that the magistrate's finding in this case definitely excluded (1) and (2) and, since he had found that the disaster was caused by the negligence of the vestry, he had also excluded (3). The court (Cave J. and Ridley J.) as reported, gave no *ratio decidendi* for their conclusion, simply saying: "We think that this case comes within the section and that the appeal must be allowed, and the case sent back to the magistrate."

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[46] These are the words attributed to Field J. in the report. The learned judge's view as to the decision in the case of *Limpus* is irrelevant to our present discussion.

[47] Taking the same view of the purpose of s. 207 as Lord Blackburn had taken of s. 74 of the Harbours, etc., Clauses Act, 1847, in *River Wear Commissioners* v. *Adamson, supra.*

[48] (1897) 77 L.T. 97.

In the absence of any indication of the judges' objection to the argument of Lush for the respondent it is difficult to obtain any real understanding of their decision. It is perhaps just possible that their lordships considered that the driver must have been familiar with the geography of the road and ought to have driven so as to keep his vehicle clear of endangering the lamp—and that they closed their minds to the magistrate's finding of fact that the driver had not been negligent.

(iv) *Ashton* v. *Eccles Corporation*[49]

Case stated. On a complaint preferred under section 20 of the Gas Works Clauses Act, 1847,[50] by the Eccles Corporation against the appellant alleging that he had "unlawfully and carelessly" damaged a lamp post belonging to the corporation the justices had adjudged that he should pay to the respondents £3 1s. 6d. for damage and costs. The section provides:

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[49] (1906) 71 J.P. 55.

[50] Repealed by the Gas Act, 1948, Sch. 4., and replaced by Sch. 3, 29 which provides: "(1) if any person wilfully, fraudulently, or by culpable negligence, injures or suffers to be injured any pipes, meter or fittings belonging to an Area Board . . . he shall (without prejudice to any other right to

> "Every person who shall carelessly or accidentally break, throw down, or damage any pipe, pillar, or lamp belonging to the undertakers, or under their control, shall pay such sum of money by way of satisfaction to the undertakers for the damage done, not exceeding five pounds, as any two justices or the sheriff shall think reasonable."

It appeared that the appellant was a servant employed as a carter and as such was conveying, at a walking pace, timber in a lorry drawn by two horses harnessed in tandem fashion. He was leading the shaft horse by the bridle and was controlling the chain horse by a rein on the near side. The leading horse was frightened by an electric tramcar coming up at speed from behind the lorry, shied, and swung away to its left, and though Ashton did his best he could not control it before it got round the wrong side of the lamp-post and did the damage in question. The justices, being of opinion that there was evidence of carelessness on the part of the appellant made the above stated order against him. The argument of counsel for the appellant, so far as can be made out from the report, seems to have been based upon the follownig points: (a) that the summons had contained the words "unlawfully and carelessly" but had not contained the word "accidentally," and that therefore it was not open to the justices to take into account the question of accident; (b) that no court had ever held that there was any difference between "carelessness" and "negligence"; (c) that therefore the justices had no right to make an order against the appellant unless there was evidence of negligence, and (d) that there was no evidence of negligence. Counsel for the respondent submitted that there was evidence of negligence and that in any case the appellant was responsible under the statute for accident. Alverstone L.C.J., declining to send the case back, said:

> "I have doubt whether section 20 was meant to punish for negligence at all, I think it gives a remedy for the lamp-post being accidentally broken. . . . I think the justices were right in coming to the conclusion that there was some evidence of carelessness short of what may be called negligence."

Darling J. said:

> "Careless does not mean 'absolutely without any care at all,' and here, I think, it means that which is almost mere accident,

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remedy for the protection of the Board or the punishment of the offender) be liable for each offence on summary conviction to a fine not exceeding five pounds."

> because the carelessness spoken of in the section involves precisely the same liability as pure accident."

What the difference between "carelessness" and "negligence" may happen to be neither judge explained. But to hold that there was a difference, enabled them to uphold the finding of the justices and to avoid the point taken by counsel for the appellant that the wording of the summons excluded the question of accident. This is a case the facts of which, indeed, may seem to most people plainly to show negligence on the part of the driver in not leading his horses in such a way as to give himself proper control of them.

Kensington Borough Council v. *Walters*

Case stated to the Queen's Bench Divisional Court by the justices for the County of London, who had dismissed the complaint preferred by the appellants against the respondent for damaging a street refuge (vested in them) in the Cromwell Road, London, when driving a motor-car, and for having failed to pay on their demand the amount of the expenses incurred by them in repairing the refuge, in accordance with section 181 (3) of the London Government Act, 1939.

It appeared that on the occasion in question the respondent was driving a motor-car along the Cromwell Road when a car turned into that road on his left-hand side. He swerved, but notwithstanding that, he was hit by the other car, and the other car forced his car into the refuge. The justices found as a fact that but for the collision his car would not have come into contact with the refuge. The justices found that the person responsible for the collision was the driver of the other car concerned and not the respondent, and that the respondent was accordingly not liable to pay the sum demanded (£25 0s. 1d.). The justices accordingly dismissed the complaint. By section 181 (2) of the Act:

> "If any person wilfully damages any property vested in a local authority, he shall in respect of each offence be liable on summary conviction to a fine not exceeding forty shillings and to pay to the authority the expenses incurred by it in making good the damage."

By section 181 (3):

> "If any person accidentally or carelessly damages any property vested in a local authority, the authority may recover from him summarily as a civil debt the expenses incurred by it in making good the damage."

In delivering his judgment in favour of allowing the appeal Lord Parker C.J. said that this case depended entirely on the correct interpretation to be placed on the section in question. After reading the above two subsections his lordship said:

> "It is to be observed, before leaving subsection (3) that the damage referred to there does not create any offence at all; the subsection merely says that the expenses of making good that damage may be recovered summarily as a civil debt."

After alluding to cases [51] referred to by counsel for the appellants, his lordship continued:

> "It is clear from the authorities that the words corresponding to those in subsection (2) and subsection (3) have been treated as providing, first, in regard to the words of subsection (2) for wilful or negligent damage for which there is a penalty as well as a right to recover the expenses, and, secondly, in regard to the words of subsection (3) for something which is not wilful and not negligent, namely, something done accidentally or carelessly, in which case there is no penalty. In one of the cases it was said that 'carelessly' was something akin to 'accidentally.'"

At this point we must pause. We have already discussed the three cases of *Harding* v. *Barker, Burgess* v. *Morris* and *Ashton* v. *Eccles Corpn*., and if by the words "the authorities" his lordship was referring to these it must with great respect be objected (i) that in section 206 of the Metropolis Local Management Act, 1855, there is no mention of "negligent damage"; and that in the two cases [52] in which that section was alluded to there is no suggestion that "negligent damage" was within its purview. Nor is there any mention or suggestion of negligence in section 19 of the Gas Works Clauses Act, 1847, which reads:

> "Every person who shall wilfully remove, destroy, or damage any . . . lamp, or other work of the undertakers . . . shall for each such offence forfeit to the undertakers any sum not exceeding five pounds, in addition to the amount of the damage done." [53]

If, as is submitted, there is no authority in the previous cases for importing the word "negligence" into the penal section, then there is no authority for *excluding* negligence from section 207 of the Act of 1855 and from section 20 of the Act of 1847. But even if the judges in the old cases had interpreted the statutes in question in that strange way, what authority would that have been for the insertion of the words "or negligently" into section 181 (2) of the Act of 1939? The words of that subsection are plain and straightforward as they stand and there is no ambiguity in them. The word "negligence" has occasioned much trouble in our courts and if it must be further complicated by a distinction from carelessness it would be valuable to have a clear judicial explanation of the difference since there must be many lawyers who would be uncertain where to draw the line. If we are to understand the judgment to mean that where negligence is proved the case could not be dealt with under subsection (3) but must fall within subsection (2) there is still greater need for further clarification of the distinction in question.

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[51] *Harding* v. *Barker, Burgess* v. *Morris* and *Ashton* v. *Eccles Corporation*, discussed *ante*, pp. 170, 172, 173.

[52] *Harding* v. *Barker* and *Burgess* v. *Morris*.

[53] This section and s. 20 are repealed by the Gas Act, 1948, Sch. 4, and both sections are replaced by Sch. 3, 29 (1), which uses the words "wilfully, frauduently, or by culpable negligence, injures . . . etc." (see *ante*, p. 174, note 50). Is this omission of the word "accident" by the legislature in 1948 of any significance?

To return to the judgment; Lord Parker said further:

> "The real point in this case is whether subsection (3) is aimed at, if I may put it that way, the person who is responsible for the damage and who as a matter of causation has caused it, or whether it is aimed at the person whose hand or vehicle has come in contact with the property and caused damage to that property thereby. In my judgment, the latter is the correct view. I think that this subsection is providing a speedy remedy for a local authority to recover expenses incurred in repairing damage without having to consider who is blameworthy in that respect. They are entitled under this subsection to recover from the person whose hand or vehicle has actually come in contact with and damaged their property."

If these words "the person whose hand or vehicle has come in contact with the property" are to be taken literally the result is startling. It seems that they were intended to mean that if A were to be overpowered by a stranger B and pushed by B through a window vested in the local authority, then B would not be liable under the statute [54] but A would be liable, since this is exactly the illustration given by Cassels J. at p. 655:

> "It does seem strange that, if a pedestrian walking along High Street, Kensington, should be pushed through a window belonging to the local authority, the local authority, receiving him through the broken window, can put out their hands and say: 'The damage is so much.' None the less, that is the position in which the respondent here finds himself."

But the dictum would also mean that if B unlawfully took a box from A's vehicle, which was lawfully stationed at the side of the road, and hurled it through the window (and A might be another authority such as the Gas Board) A would be liable and not B, since it was A's property which had come in contact with the window. And it would be the same if B happened to be an employee of the local authority in question. It is irrelevant to argue [55] that the luckless A might have a legal claim against B to recoup his loss, for (a) an innocent man ought not to be put to the trouble, expense, and risk of litigation, and (b) the case may well be that B is a man of straw who can pay nothing ; or indeed, that B cannot be identified. Suppose, for example, that A while trying to assist the police to arrest a malefactor whom they were chasing, was forced through the window by the man, who thus effected his escape and has successfully eluded capture ; or that A were one of the policemen. Later, on the same page, Lord Parker said:

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[54] See later on the same page: "If the owner of the car who had forced the respondent's car into the refuge had been summoned, I think that his answer would have been, 'It was not my hand, not my car, that came into contact with the street refuge. It may have been my negligence that caused it, but for that I cannot be summoned under the subsection.'"

[55] As suggested by Edmund Davies J. at p. 655.

> " I think that section 181 (3) of the Act does not relate to anybody but the person who actually does the accidental or careless act . . . "

Now if these words be taken alone, they would, it is respectfully submitted, be the true test of liability, which we have seen to be the ancient and accepted principle of our English law ; and in the present case it would clearly be the unnamed driver of the other car who would be liable, since by his driving he overpowered Mr. Walters (who could do nothing to prevent it), and forced him and his vehicle into the street refuge. On the finding of the justices it is plain that Mr. Walters did not *do* any accidental or careless act whatever. This is what Wills J. was saying in the passage cited from the case of *Harding* v. *Barker*, when holding *not* liable the absent employer of the servant who was actually driving and steering the van at the time when it struck the lamp ; that passage is really in favour of Mr. Walters and not against him. Unfortunately his lordship went on to add:

> " whether voluntarily or involuntarily, as in this case, where he was forced into the street refuge."

On analysis this will be found to be a contradiction of the previous statement, due to the ambiguity in the word " act." The word " act " can mean either (i) what a man is doing, *i.e.*, his line of conduct on a particular occasion ; or (ii) a particular result of that line of conduct. A line of conduct (whether by action or inaction) brings about a closely linked chain of consequences, *i.e.*, of particular results, which for greater clarity of argument may be termed " deeds." A man who adopts freely a line of conduct may with propriety be said to be " acting voluntarily." It may be that he foresees some particular consequence of his conduct, *i.e.*, a deed ; and if so, he achieves that deed voluntarily. But if he did not foresee it he achieves that deed involuntarily, since his will did not operate to include it. It could therefore be properly described as an accidental deed, for it is certainly *done* by him. Thus a man who intentionally leaps from an aeroplane in flight embarks on a line of conduct which he knows will bring him into contact with the earth; his contact with the earth will be a voluntary deed so far as he is concerned. But a man who, against his will, is thrown from an aeroplane does not embark voluntarily on a descent—and although he knows he must reach the earth he does not reach it voluntarily; his contact with the earth is not *his* deed (in the ancient parlance "not his act") but the deed of the man who threw him out. The contact of Mr. Walters' car with the refuge was definitely "not his act" in this sense[56] and he was not a person who came within the plain words of the statute, namely, a person who "accidentally[57] or carelessly *damages*" any property vested in the local authority.

To interpret the statute as fixing liability on the victim of another man's force which has used his person or his property as a missile whereby damage has been caused to a third party is to attribute to the legislature a prehistoric attitude of mind such as that which conceived the law of deodand. And it produces a conclusion which cannot be distinguished from the one described by Jessel M.R. as "absurd and revolting."[58] If it is important that justice should be seen to be done, it is even more important to avoid its being seen not to be done.

Conclusion

The points on which the decision in the case of *Kensington B.C.* v. *Walters* is here challenged can be briefly stated as follows:

1. There was no adequate submission to the court of the basic principle of the common law that a man is not to be held legally responsible for a harm which he did not bring about as the result of his own freely willed conduct. Mr. Walters' real defence was: "It was not my act."
2. There is nothing in the words of the statute which plainly and directly excludes that common law principle.
3. The decision involves the violation of two long-established canons of interpretation (even if nowadays they be regarded as no more than persuasive), namely, (a) that where more than one meaning can be found in the words of the statute that meaning should be preferred which accords with the common law; and (b) that efforts should be made to avoid the acceptance of a meaning which would produce injustice and/or absurdity.

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[56] *Ante*, p. 175.

[57] We have already considered the ambiguity of the word "accident," *ante*, p. 92.

[58] In the *Adamson* case, *ante*, p. 168.

That the Divisional Court had a feeling of the injustice and, indeed, absurdity of the situation produced by their judgment may, perhaps, be gleaned from the words of Cassels J., who said:

> "I think that the respondent may well feel that he has a grievance in the matter. . . . This is just one of those cases in which it may well seem strange to the individual who is called upon to put his hand into his pocket, and pay for damages for which he was in no way responsible."

and of Edmund Davies J., who said:

> "One cannot but sympathise with the respondent for the position in which he finds himself."

It is therefore submitted with all due respect that the interpretation of the words of the London Government Act, 1939 (and by inference, of the words of the Metropolis Management Act, 1855, also), by the court in *Kensington B.C.* v. *Walters* should be reconsidered. The respondent appeared in person and it could not be expected that he himself would be able to carry through a legal argument with that force and tenacity which were needed in a case of this sort and which experienced counsel would have displayed. It is probable that there is no provision for appeal from a judgment of the Divisional Court,[59] but that court has before now found ways of escaping from the thraldom of *stare decisis* when this doctrine, if blindly followed, would have worked hardship, as also has the Court of Criminal Appeal.[60] If, as is contended here, the interpretation was wrong, then, although nothing can be done for the unfortunate Mr. Walters, at least it ought not to be taken as unquestionable authority for future cases.

Aiding and Abetting Offences under the Licensing Act, 1953

By F. Vernon Renshaw, ll.b.

Aiders and abettors under this Act are normally concerned with two different types of offences, namely, those committed in licensed premises and offences committed in the premises of a registered club.

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[59] See the concluding remarks of Lord Goddard C.J. in *Smith* v. *Wyles* [1959] 1 Q.B. 164, at pp. 176, 177, referring to purely criminal cases. But the provisions of s. 181 (3) are of a penal nature even though the penalty is to be recovered "as a civil debt."

[60] See *Plunkett* v. *Alker* [1954] 1 Q.B. at pp. 425, 426; and *R.* v. *Taylor* [1950] 2 K.B. 368.

Licensed premises

Section 100 of the Licensing Act, 1953, states, *inter alia*, that no person shall, except during permitted hours, sell or supply either himself or by his servant or agent any intoxicating liquor to any other person in licensed premises. This prohibition applies whether the intoxicating liquor is to be consumed either on or off the premises. The same section prohibits the consumption by any person of intoxicating liquor on the premises, or the taking away of such liquor from the premises except during permitted hours. The liability of the licensee under this section is a very heavy one, and if persons are found consuming glasses of beer on licensed premises after the closing of permitted hours, the licensee may find himself liable to proceedings in one of several ways. If, as often happens, the liquor were sold by one of the barmen outside the permitted hours, the licensee is responsible in law for the barman's actions for selling " by his servant " under section 100. If he were present on the premises when the transaction took place, his defence that he did not know of the sale would not help him, for this section is absolute and *mens rea* is completely immaterial. This absolute liability can extend to cases where the licensee was not even present on his premises when the offence was committed. A licensee cannot delegate his duties to a barman and then go to the pictures for the evening with an easy mind, for if it transpires that unlawful sales of intoxicating liquor are made outside permitted hours on his licensed premises, then his absence and complete lack of knowledge will not prevent him from being convicted. This was well illustrated in the case of *Bennett* v. *Hanks*,[1] where the licensee was convicted by justices of supplying intoxicating liquor outside permitted hours. The then Lord Chief Justice, upholding the conviction of the licensee, held that the placing of a manager on the licensed premises did not absolve the licensee from responsibility for breaches of the licensing law, although the licensee may have not even been present at the time, nor known of the breaches. In his judgment, the Lord Chief Justice said: " . . . here a manager was put in. The respondent (the licensee) obviously understood that he will be responsible for breaches of the licensing law, but it does not matter whether he understood or not. He is responsible as the licensee . . ." So far as being charged as a principal is concerned, therefore, it seems quite clear the licensee will be absolutely responsible both for his own acts and also the acts of his servant.

On many occasions, however, the prosecution see fit to charge the barman with the principal offence of selling intoxicating liquor outside permitted hours. In these cases, the licensee is often proceeded against for aiding and abetting the offence of his servant or barman. In these circumstances quite different considerations apply. Although in a case of aiding and abetting, the prosecution do not have to prove that the alleged offender knew that the acts complained of constituted an offence in law, they do have to show, firstly, that he had full cognisance of the facts which the prosecution say amount to an offence, and, secondly, that the aider and abettor either rendered some assistance to those acts, or did not stop them under circumstances where it was his clear duty to intervene. In the case of *Ferguson* v. *Weaving*,[2] a large number of people were found consuming intoxicating liquor in licensed premises after permitted hours. The consumers were convicted by the court of summary jurisdiction, but informations against the licensee for aiding and abetting these offences were dismissed. The court had found in effect that three waiters employed by the licensee were in the room in question but had failed to carry out the licensee's instructions to remove all glasses at 10 o'clock. The licensee had also "dipped" the lights in the room from another part of the premises at 10 p.m. to indicate that it was closing time. The Divisional Court held that the charge against the licensee for aiding and abetting was rightly dismissed. This case illustrates the vital distinction between charging a licensee as a principal on the one hand where *scienter* is often immaterial, and aiding and abetting on the other where a prosecution must show some element of connivance. Even here, however, a prosecution might succeed against a licensee who is charged as an aider and abettor if it could be shown, for example, that the licensee deliberately turned his back on what was happening in a particular room of the licensed premises so that he would not be aware of what actually transpired. In other words, if the licensee's actions amount to a wilful shutting of the eyes, this might well be held to be aiding and abetting.

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[1] [1954] Crim.L.R. 545.

It may be seen from the above that there is a hiatus in the law in this respect, for it has been held on more than one occasion,[3] that section 100 of the Licensing Act, 1953, does not make it an offence for a licensee TO PERMIT the consumption of liquor after hours—the licensee must either be charged with selling or supplying it, or, in the alternative, with aiding and abetting its consumption necessitating in the latter, proof of knowledge or some form of connivance. If the Act had made it an offence to permit the consumption of intoxicating liquor, under these circumstances, the burden of proof laid on the prosecution would be much easier to discharge.

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[2] [1951] 1 K.B. 814.

[3] See *James & Son* v. *Smee* [1955] 1 Q.B. 78; *Somerset* v. *Wade* [1894] 1 Q.B. 544.

One further example of the different degrees of proof required in these cases is illustrated by reference to section 129 of the same Act. This section makes it an offence for a licensee to knowingly sell or allow any other person to sell intoxicating liquor to be consumed on the premises by a person under eighteen. The word "knowingly" refers, of course, to the age of the child and the prosecution must prove this knowledge as part of their case. Many cases have arisen where a police officer has entered licensed premises and seen two youths consuming intoxicating liquor. Being impressed by their youthful appearance, the officer has asked the two consumers for their age in the presence of the licensee. Often they admit to being under eighteen, and the officer probably discovers that one of the youths bought the two drinks for himself and his friend. The one who purchased would be told that he would be summoned first, for, being a person under eighteen, buying intoxicating liquor in licensed premises to be consumed by him on such premises, and secondly, for buying intoxicating liquor for consumption by his friend, who was also under eighteen. It is interesting to note that this section creates no substantive offence against the second boy; in other words, it is not an offence for a person under eighteen to consume liquor in licensed premises. The second boy can only be prosecuted for aiding and abetting the first one to buy the drink for him. So far as the purchasing is concerned, the word "knowingly" is omitted from the offence of buying intoxicating liquor for consumption by a person under eighteen; this indicates that such a purchaser is liable to be convicted whether he did or did not know that the intended recipient of his generosity was under eighteen.

The licensee, however, is in a more fortunate position under this section, because the prosecution have to show either that he knew that a person buying drink for his own consumption was under eighteen or, in the alternative, that he knew that any person consuming intoxicating liquor was known by him to be under eighteen. This requirement on the prosecution of proving *scienter* is provided to meet the difficulties experienced by licensees when called upon to supply drink to persons who state, when asked, that they are over eighteen years of age.

Registered clubs

The provisions of section 100, just discussed, apply equally to the premises of a registered club, so far as the sale and supply and consumption of intoxicating liquor are concerned. In this case, of course, there is no licensee and it would appear that the word " himself " in section 100, in connection with a club, would cover the members of the committee. Therefore, as the prohibition in the section is absolute, it seems that members of a committee may be liable for the acts of their steward or barman. Once again, of course, a barman may be convicted of supplying intoxicating liquor outside permitted hours in a club either as a principal or as an aider or abettor. If the prosecution see fit to charge a barman in a club with supplying liquor outside permitted hours and the persons found in the club with consuming the liquor, then various members of the committee may be charged with aiding and abetting the barman to supply, and the consumers to consume. Once again, *scienter* must be proved. If on a police raid on club premises, a large number of people are found to be consuming intoxicating liquor outside permitted hours, it would be very difficult for any committee member present to escape liability as an aider and abettor, for as a committee member, it is his duty to ensure that the licensing laws are upheld. Sometimes, however, the defence seek to prove that the committee members in a particular club are not liable as aiders and abettors, because they were upstairs in a committee room holding a meeting, for example. In these circumstances, it may well be that in the absence of any proof to the contrary, the defence will succeed. Once again, however, if the prosecution can show that the committee deliberately absented themselves from the room in question in order to facilitate the unlawful consumption of intoxicating liquor, they may very well succeed in their case. In practice, an astute prosecution will charge any committee members present in a room where consumption was taking place, simply with aiding and abetting that consumption. If the committee members present were charged with aiding and abetting the supply by the steward, and he proved that the drink was in fact supplied before 10 o'clock, then they would naturally escape all responsibility. When, however, those committee members, and, indeed, the barman or steward, are charged with aiding and abetting the actual consumption of liquor outside permitted hours, they stand to be convicted irrespective of the time of supply.

Case and Comment[*]

BAIL

Court of Criminal Appeal — appeal dismissed — fiat of Attorney-General applied for—application for bail

See R. *v.* WELHAM, p. 190, *post.*

BRIBERY

Offer of bribe—meaning of " corruption "

R. v. Smith

Court of Criminal Appeal: Lord Parker C.J., Hilbery and Pearson JJ.: December 14, 1959: *The Times*, December 15, 1959.[1]

S. had for many years been convinced that the C. Borough Council, police and magistrates were corrupt. He had written a number of letters to the Press inviting them to make investigations and to witness the exposure of corruption about to be made. For the purpose of exposing the Borough Council S. (through another man) offered the mayor a bribe which the mayor did not accept. S. was convicted at assizes under section 1 (2) of the Public Bodies Corrupt Practices Act, 1889, which provides: " Every person who shall by himself or in conjunction with any other person corruptly give, promise or offer any gift, loan, fee, reward or advantage . . . as an inducement to or reward for . . . any member, officer or servant of any public body doing . . . anything in respect of any matter or transaction . . . in which such public body as aforesaid is concerned " commits an offence. At the trial the jury were directed that as a matter of law the word " corruptly " meant an intention to corrupt and the motive, however praiseworthy, was irrelevant.

Held, dismissing the appeal, that the sole question in this case was whether " corruptly " in its context meant a deliberate offering of cash or something of the sort with the intention that it should operate on the mind of the offeree to make him enter into a corrupt bargain or whether it meant that the offeror must intend to see the transaction through. It was the appellant's case that he wanted the mayor to accept the bribe and he (the appellant) would then have exposed him: the appellant wanted no favours. In the opinion of the court "corruptly" was used in the former sense, the direction to the jury was correct and the conviction must stand. [H. P.]

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[*] Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For the appellant: *Stanley Price Q.C., D. M. Savill* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *W. A. B. Goss* (instructed by the Director of Public Prosecutions).

Commentary. The argument for the appellant was that if "corruptly" meant no more than the prosecution contended, it added nothing to the other words of the section. It is the duty of the court to give a meaning to every word in the section: *R.* v. *Williams* [1953] 1 Q.B. 660, 666 *per* Lord Goddard C.J. The court admitted that "that, to a large extent, may be true," but added, "but it seems to this court that the word 'corruptly' in the sense to which I have referred may well be necessary in section 1 (2) in the case of rewards or fees given for services or favours already rendered." With great respect, the difficulty about this view is that "corruptly" governs payments for future as well as past favours and is left meaningless so far as future favours are concerned.

The effect of the present decision would seem to be that a police officer or other person who tendered a reward for the sole purpose of acquiring evidence would be guilty of the crime. While such conduct might be reprehensible, it would hardly seem to be properly described as "corrupt." As a general rule a person who participates in an offence simply for the purpose of acquiring evidence is not an accomplice for the purpose of the rule requiring corroboration, even though, in such a case, his motive does not negative *mens rea*. *Cf. R.* v. *Bickley* (1909) 2 Cr.App.R. 53 and *Marsh* v. *Johnston* [1959] Crim.L.R. 444.

COMPANIES

Whether auditor of company an "officer" of company

R. v. Shacter

Court of Criminal Appeal: Lord Parker C.J., Hilbery and Salmon JJ.: December 7, 1959: *The Times*, December 8, 1959.[2]

S. was convicted at assizes of a number of offences of publishing fraudulent statements, falsifying books of account and similar offences, having been charged in each count as an officer of the company. S., in fact, was the auditor of the company in each case. The jury were directed that if S. had been appointed auditor and was exercising the office of auditor at the material times, then, as a matter of law, he was an officer of the company. S. appealed to the Court of Criminal Appeal on the ground of misdirection. He contended that an auditor was not, prima facie, an officer of the company. An auditor's duty was to safeguard the shareholders and not to help the directors, and he was not concerned with the day-to-day running or internal management of the company In the definition section of the Companies Act, 1948, s. 455, an officer " includes a director, manager or secretary " but does not refer to an auditor.

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[2] For the appellant: *Christmas Humphreys, Q.C., A. K. Hollings* (instructed by A. L. Hamwee & Co., Manchester). For the Crown: *Fenton Atkinson, Q.C., P. Kershaw* (instructed by the Solicitor, Board of Trade).

Held, dismissing the appeal, that section 159 (1) (5) and (6) of the Companies Act referred to an auditor's appointment " to hold office " and to " the office of auditor." It could well be asked to what office an auditor was being appointed unless it were an office in the company and what officer he became unless it were an officer of the company. Further sections of the Act clearly showed that an auditor might be an officer of the company, in particular the references to an auditor " whether an officer of the company or not." There were authorities dealing with questions of civil liability under earlier Acts (now replaced by section 333 of the present Act), namely, *Re London and General Bank* [1895] 2 Ch. 166; *Re Kingston Cotton Mill Co.* [1896] 1 Ch. 6 and *Re Western Counties Steam Bakeries* [1897] 1 Ch. 617, where a distinction was drawn between an auditor appointed to an office and an auditor appointed *ad hoc* for some limited purpose. This court saw no reason not to follow these cases and, accordingly, found that the appellant was at the relevant time an officer of the company and that the direction to the jury was right. [H. P.]

Commentary. The omission of " auditor " from the offices enumerated in the definition section may be explained by the possibility of the appointment of an auditor *ad hoc* who would not be an officer. This also explains the words (referring to an auditor) " whether an officer of the company or not " in sections 167 (5), 205 and 448 (1).

COSTS

Costs awarded against defendant—prosecution not legally represented—presence of police officer

R. v. Burt

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Cassels and Ashworth JJ.: *The Times*, January 23, 1960.[3]

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[3] For P.: *James Miskin* (instructed by Messrs. Amery-Parkes & Co.). As *amicus curiae*: *J. R. Cumming-Bruce* (instructed by the Treasury Solicitor).

P. was charged with an offence under section 49 of the Road Traffic Act, 1930. The evidence for the prosecution consisted solely of the evidence of one police officer. P. was found guilty of the offence, fined 20s. and ordered to pay two guineas costs.

P. applied to the Divisional Court for an order of certiorari to quash that part of the order which related to costs. In his affidavits in support of the application, P. asserted that at the end of the case his solicitor had asked the metropolitan magistrate why he had awarded costs against P., to which the magistrate had replied " Because I say so " ; and that when the solicitor had pointed out that the prosecution had not been represented, the magistrate had replied " That is my order."

The metropolitan magistrate had sworn an affidavit in which he had said that he had had regard to the fact that it had been necessary for the police constable to attend court and to give evidence, and that he had " estimated that the Metropolitan Police had thus been prevented from employing Police Constable Skinner upon other police duties for half a day." The magistrate said that he had taken the view that it was reasonable in the circumstances to order P. to pay the sum of two guineas as a fair contribution to the costs that had been incurred by the prosecution by appropriation to the case of the time of the Police Force.

It was argued on P.'s behalf that the magistrate's only jurisdiction to make the applicant pay costs was to make him pay such costs as he thought to be just and reasonable ; that the prosecution had in fact incurred no costs ; and that the costs awarded were not awarded as costs but as a fine or penalty. It was further argued that costs could not include any sum of money as compensation for the salary paid to a police witness, because the salary would be paid whether the police witness were in court or not.

Held, dismissing the application, (1) applying *Att.-Gen.* v. *Shillibeer* (1849) 19 L.J.(N.S.)Ex. 115, that there was no reason why costs should not be awarded to the Crown in respect of the services of a salaried employee of the Crown ; and

(2) that P. had failed to show that the two guineas costs which had been awarded could not represent the costs which had been properly incurred. [D. C.]

Commentary. In *Att.-Gen.* v. *Shillibeer* the Crown was awarded costs in respect of the services of the Crown solicitor in conducting an information for penalties, notwithstanding the fact that the solicitor was paid a salary. Parke B. said: " The costs of this suit are to be taxed on the same principle as if the Crown solicitor were himself conducting each suit at the expense of the Crown in the ordinary way."

EVIDENCE

Accomplice—corroboration—warning to jury—application of the proviso to section 4 (1) *of the Criminal Appeal Act*, 1907

R. v. Prater

Court of Criminal Appeal: Hilbery, Cassels and Edmund Davies JJ.: December 21, 1959.[4]

P. was tried, together with one Welham and another man, at the Central Criminal Court and was convicted of conspiracy to defraud hire-purchase finance companies and of uttering forged documents. The facts appear in the report of *R.* v. *Welham*, *infra*, p. 190. P. did not give evidence. Welham gave evidence on his own behalf, and this evidence implicated P. P. appealed to the Court of Criminal Appeal on the main ground that no warning was given to the jury as to the danger of acting upon Welham's uncorroborated evidence.

Held, dismissing the appeal, that in practice it was desirable for a warning to be given to the jury as to the danger of acting upon the uncorroborated evidence of an accomplice, whether the accomplice came from the dock (as in this case) or as a witness for the prosecution. In *Davies* v. *Director of Public Prosecutions* [1954] A.C. 378 the rule was laid down that a conviction would be quashed where no such warning had been given, unless the appellate court could apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907; but this did not apply in the case of a co-defendant. This court thought that it was desirable to give such a warning in cases, as here, where a witness might be regarded as having some purpose of his own to serve. Where, however, there was an omission to direct the jury this court would not interfere if satisfied that there had been no miscarriage of justice. On those grounds, and bearing in mind the proviso to section 4 (1), this court saw no reason to disturb the finding of the jury. [H. P.]

Commentary. In *R.* v. *Barnes and Richards* (1940) 27 Cr.App.R. 154, it was said that a prisoner who gives evidence on his own behalf and incriminates a co-prisoner, is not to be regarded as an accomplice of the co-prisoner, and that the rule of practice requiring corroboration does not apply to such a case. It has been argued ("Corroboration of the Evidence of a Co-prisoner," by P. C. Hubbard [1958] Crim.L.R. 728) that this remark was a mere *obiter dictum* since the prisoners, whose evidence was referred to, had been acquitted and therefore (so it was contended) could not be considered to be accomplices. It is submitted with respect that this is a dangerous doctrine. The acquittal of a prisoner means no more than that the jury are not satisfied beyond reasonable doubt of his guilt. Even if, when the question whether a particular witness is an accomplice arises, the onus of proof is on the prisoner, he would surely have to establish this fact only on a balance of probabilities and not beyond reasonable doubt. If this be correct, it follows that a jury might properly find that a prisoner, X, is an accomplice of Y and yet acquit him of the crime with which both are charged.

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[4] For the appellant: *W. R. Fitch* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *M. D. L. Worsley* (instructed by the Director of Public Prosecutions).

The proposition stated in *Barnes and Richards* seems to be supported by the shortly reported cases of *R.* v. *Green* (1908) 1 Cr.App.R. 124 and *R.* v. *Martin* (1910) 5 Cr.App.R. 4. On the other hand, it was said that a warning against convicting on a co-prisoner's evidence ought to be given in *R.* v. *Dean* (1924) 18 Cr.App.R. 21; *R.* v. *Garland* (1943) 29 Cr.App.R. 46 and *R.* v. *Rudd* (1948) 32 Cr.App.R. 138. It is submitted that the better view is that stated in the latter group of cases, for a co-prisoner has more, rather than less, incentive to give false evidence than does an accomplice whose case has been disposed of. In *Davies* v. *D. P. P.* Lord Simonds expressly stated that the House was not concerned with the case of a co-prisoner's evidence. It is not easy, however, to see why the same rules should not apply.

See further, P. C. Hubbard, *op. cit.*, and R. N. Gooderson, "The Evidence of Co-Prisoners," 11 *Cambridge Law Journal* 209.

FORGERY

Uttering forged documents with intent to defraud—whether economic loss necessary: Application for bail on application for Attorney-General's fiat

R. v. Welham

Court of Criminal Appeal: Lord Parker C.J., Hilbery, Cassels, Salmon and Edmund Davies JJ.: December 12, 1959.

Court of Criminal Appeal: Hilbery, Gorman and Paull JJ.: December 18, 1959.[5]

W. was the sales manager of M. Ltd., which carried on business in motor-lorries. One Prater (see *R.* v. *Prater, supra,* p. 189) was a director of M. Ltd and of P. Ltd., which carried on business in furniture. One G. was also a director of P. Ltd. Over a period of nearly a year two finance companies advanced large sums of money to the two companies in respect of hire-purchase and credit-sale agreements. The agreements, which it was said were forgeries, were witnessed either by W. or G. W., P. and G. were tried at the

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[5] For the appellant: *C. W. G. Ross-Munro* (instructed by Bellamy, Bestford & Co.). For the Crown: *M. D. L. Worsley* (instructed by the Director of Public Prosecutions).

Central Criminal Court upon an indictment containing six counts. Count 1 charged a conspiracy to defraud the finance companies; counts 2 and 3 charged uttering forged documents with intent to defraud upon which M. Ltd. had obtained advances; and counts 4, 5 and 6 charged uttering forged documents with intent to defraud upon which P. Ltd. had obtained advances. W.'s defence was that he had no intent to defraud the finance companies but that he was uttering the forged documents in order to make it appear to anyone inspecting the records of the companies that the credit restrictions were being observed. The jury were directed that, if they thought W.'s evidence might well be true, he was entitled to be acquitted on count 1 since the conspiracy alleged was a conspiracy to defraud the finance companies and no one else. As to counts 2 and 3 the jury were directed that, if they were satisfied that W. had put forward these forged documents with intent to defraud the capital issues committee (which was W.'s own case), then he would be guilty, because the prosecution were not bound to establish an intent to defraud any particular person. P. was convicted on all counts. W. was acquitted on count 1 and (by direction) on counts 4, 5 and 6. W. appealed to the Court of Criminal Appeal against his convictions on counts 2 and 3 on the ground that the jury were wrongly directed on the question of the intent to defraud. W. also applied for bail pending an application for the fiat of the Attorney-General for appeal to the House of Lords.

Held, dismissing the appeal, that the sole question in the appeal was whether the jury were rightly directed that the appellant's own evidence amounted to an admission of an intent to defraud. Since the offences were offences against section 4 (1) of the Forgery Act, 1913, an intent to defraud someone was an essential ingredient. The classic definition of intent to defraud was that laid down by Buckley J. in *Re London and Globe Finance Corporation* [1903] 1 Ch. 726, that: "To deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action." Accordingly, it was said that the essential element in an intent to defraud was to deprive the person deceived of something of value, thus causing some economic loss. That view was stated in *Russell on Crime* (11th ed., pp. 1428–1430) and adopted by Professor Glanville Williams in his *Criminal Law* (pp. 76–77). However, this court had come to the conclusion that this was too narrow a view. There was no reason to introduce such a limitation so that, where the intention was to cause the person deceived to act to his real detriment, it did not matter that there was no economic loss. A deceit accompanied by an intention to deprive the person deceived of a right or to induce him to do something contrary to what it would have been his duty to do was sufficient. To hold otherwise would involve holding that *R.* v. *Bassey* (1931) 22 Cr.App.R. 160, was wrongly decided and that the observations of Lord Tucker in *Board of Trade* v. *Owen and Seth-Smith* (1956) 41 Cr.App.R. 11, were misconceived. This view was also in accordance with Paull J.'s decision in *R.* v. *Potter* [1958] 42 Cr.App.R. 168, at 174, and with the old cases decided before forgery was made a statutory offence, for example, *R.* v. *Toshack* (1849) 4 Cox C.C. 38 and *R.* v. *Hodgson* (1856) 1 D. & B.C.C. 3. In the present case the appellant was intending by deceit to induce the person deceived to act to his detriment and thus was intending to defraud; he was intending by deceit to deprive the person deceived of the opportunity of exercising a right, namely, a right to prosecute for breach of the credit restrictions, thus depriving the community of the protection afforded by them. Accordingly, the appeal would be dismissed.

On the question of bail, the appellant's counsel had informed this court that the appellant had applied for the fiat of the Attorney-General for the purpose of appealing to the House of Lords. It had been decided in *R.* v. *Thompson*, 12 Cr.App.R. at 270 and 278, that this court had power to grant bail once the fiat had been obtained, but the question now was whether there was power to grant bail while the application for the fiat was pending. In the definition section of the Criminal Appeal Act, 1907, s. 21, the term appellant included " a person who has been convicted and desires to appeal under this Act." Thus an appellant was not necessarily one who had an appeal actually in being and covered W. in the present case. Accordingly this court had power to grant bail and would do so. [H. P.]

Commentary. The meaning of " intent to defraud " was fully discussed in the commentary on *R.* v. *Garland* [1960] Crim.L.R. 129. The view there expressed that the " economic loss " concept of fraud is too narrow is confirmed by the present case; but the suggested test (an intent to induce the victim to confer some benefit) would justify the conviction in the present case only if the broad view were taken (as, it is submitted, it should be) that a benefit may be conferred by inaction as well as by action.

INDICTMENT

Scots law—defective libel

See MACK *v.* H.M. ADVOCATE, p. 201, *post*.

LARCENY

Misappropriation of money received as change for third person

R. v. Boylan

Plymouth Quarter Sessions: Recorder, N. J. Skelhorn, Q.C.: July 9, 1959.[6]

B. was charged with the larceny of a 10s. note belonging to W., the charge being based on the following facts.

The accused was handed a £1 note by W. who asked him to buy a half cwt. of coal for her with it. He returned with the coal, handed her 5s. 11d., said that he'd lost a 10s. note, but that he must have handed it to the coal merchant with the coal chit. Later he told W. that the coal merchant had not got it.

In fact the coal merchant had found the 10s. and handed it to the accused before the accused actually told W. that the coal merchant had not got it.

When eventually seen by the police the accused admitted that the coal merchant had handed him the 10s. note but said that he had lost it on the way back to W.

According to defence counsel's note, a defence submission at the end of the prosecution case was upheld. The Recorder stated that the 10s. note did not belong to W. as it was open to the accused to give silver or any other form of money to W. Accordingly there was no larceny of the 10s. (Nor did he steal it from the coal merchant, who parted with it willingly.)

The Recorder went on to say that it might be that the proper offence for which the accused should have been charged and indicted was fraudulent conversion. On the authorities, however (*R.* v. *South* (1907) 71 J.P. 191) this was by no means certain.

[MISS DEIRDRE MCKINNEY, *Barrister-at-Law.*]

Commentary. It is clear law that a man who acquires ownership and possession of a chattel cannot be guilty of larceny of it. Once it was held that B. became the owner of the 10s. note, the prosecution's case, therefore, fell to the ground.

A person who acquires money (or goods) in circumstances similar to the present does not necessarily become the owner. In *R.* v. *De Banks* (1884) 13 Q.B.D. 29, the prisoner was entrusted with the prosecutor's mare to sell her. He did so and misappropriated the proceeds. It was held, Stephen J. dissenting, that he was guilty of larceny *as a bailee of the money*. In *R.* v. *Governor of Holloway Prison, ex p. George* (1899) 18 Cox 631, G. was entrusted by the prosecutrix with a bond with authority and instructions to obtain a loan for her. He obtained the loan and misappropriated it to his own use. It was held, following *De Banks*, that he was guilty of larceny as a bailee. In *R.* v. *Bunkall* (1864) L. & C. 371, the prisoner was entrusted by the prosecutor with money to buy coals. He did so, and was convicted of larceny as a bailee of some of the coals which he retained for his own use. In none of these cases does it appear that the third party who delivered to the prisoner the money or the coal had any knowledge of the existence of the prosecutor; and it is submitted that the bailment arose by implication of law upon the prisoner's converting the prosecutor's property into another form. If the accused in the present case had become a bailee of the *£1 note*, the case would, it is submitted, have been indistinguishable from the three earlier cases; and it must be presumed that he did not become a bailee but acquired ownership.

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[6] For the prosecution: *John Hall* (instructed by Mr. T. E. J. Savery, Plymouth). For the defence: *Alan Tyrell* (instructed by the court).

Whether or not a delivery of money creates a bailment is a question of intention. Thus if a small boy were handed a £5 note to pay a bill, he would almost certainly become a bailee because it would be clear that he was intended to deal with the note *in specie*; but if an adult is handed 5s. to buy a packet of cigarettes he probably becomes the owner of the coins, being expected to mingle them with his own money and to account for an equivalent sum. The delivery of the £1 note in the present case presumably fell into the second category.

As for fraudulent conversion, *R.* v. *South* was a case where the accused, having agreed to obtain orders and collect moneys on behalf of the prosecutor, misappropriated certain sums, and was charged with fraudulent conversion. The Common Serjeant held that there was no case to go to the jury on the ground that the customer intended the money for South personally, since they had previously been dealing with him on his own account, and that there was, therefore, no entrusting. This reasoning, however, seems to conflict with the decisions of the Court of Criminal Appeal in *R.* v. *Cuffin* (1922) 27 Cox C.C. 293 and *R.* v. *Messer* [1913] 2 K.B. 421. In the latter case a taxi-driver was convicted of fraudulent conversion of money received from fares for or on account of the proprietor of the taxi. Yet surely the persons dealing with the taxi-driver intended to make him the absolute owner of the money given, in just the same way as did the persons dealing with South (see also, *Russell on Crime*, 11th ed., 1268, n. 41, and Kenny, *Outlines of Criminal Law*, 17th ed., p. 314, n. 7). Even if it were conceded that *South* is wrongly decided, however, there remains the difficulty that it would be necessary to establish a fiduciary relationship between the parties. *Cf. R. v. Jones* (1948) 33 Cr.App.R. 11. It is submitted that this means no more than that the recipient of the property should be under a duty to keep in his possession or under his control, not the actual property (for then he would be a bailee) but an equivalent sum, until the end of the transaction. If this is correct, then it seems clear that there was a fiduciary relationship in the present case.

Taking and driving away a motor-vehicle—intent

See R. *v.* Gibbs, p. 197, *post*.

RAILWAYS

Obstruction—removal of engine—whether possible as opposed to actual obstruction sufficient—Malicious Damage Act, 1861 (24 & 25 *Vict. c.* 97), *s.* 36

R. v. Gatenby and others

Leeds Assizes: Thesiger J.: January 6 & 7, 1960.[7]

Three youths were charged at Leeds Assizes with the offence of obstructing a railway, contrary to section 36 of the Malicious Damage Act, 1861. The three defendants, who were employed by British Railways, had, while off duty, trespassed on railway property and moved a railway engine in reverse near certain motive power sheds. The evidence for the prosecution varied. One prosecution witness stated that there was on the particular line an engine which was due to leave at 3.45 a.m. on the following morning, but this was denied by the defendants. The defendants, however, conceded that, as a result of the engine being moved, one other line in addition to that on which it was might have been obstructed. Having moved the engine, the defendants found that there was insufficient steam to enable it to be returned up a slight gradient to its original position. The movement was discovered at about midnight and, on hearing other employees coming to the scene, the defendants ran away.

At the close of the case for the prosecution arguments were heard by the judge in the absence of the jury. It was contended for the defendants that the plain meaning of section 36 was that a railway had to be obstructed in fact and not in theory, and reliance was placed on the difference in wording between the present section and section 15 of the Railways Regulation Act, 1840 (rep.). For the Crown reliance was placed on *R.* v. *Bradford*, Bell 268; 8 Cox 309 which, it was contended, was still good law and reference was made to the words of Cockburn C.J. in that case.

Thesiger J. overruled the submission made on behalf of the defendants. In the course of so doing, he said that he was not much enamoured of the argument advanced by counsel for the defendants with regard to the distinction to be drawn between the earlier and the later Acts and the reliance which was placed on the omission of the words " in such manner " in the later Act; but were it not for the fact that he was embarrassed by the words of Cockburn

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[7] For the defendants: *W. A. B. Goss* (instructed by Messrs. Simpson, Curtis & Co., Leeds). For the prosecution: *G. H. Hartley* (instructed by T. B. Atkinson, York).

C.J. in *R.* v. *Bradford* (*supra*) he would himself have held that section 36 contemplated an actual, as opposed to a notional, obstruction. He felt, however, that the judgment to which he had referred was binding on him and that he must hold that, if there was evidence for the jury to find that an obstruction could have taken place, he must leave the issue to them. In his view, it was possible that, even though by midnight the engine causing the obstruction had been removed from the place, for it to have obstructed the other engine, although that engine was not due to leave till 3.25 a.m.; and, if so, the jury would be entitled to find that the offence was proved.

The three defendants were convicted and were granted conditional discharges. [T. R. FITZWALTER BUTLER, *Barrister-at-Law*.]

Commentary. *R.* v. *Bradford* was a decision of the Court for Crown Cases Reserved and therefore binding on the court in the present case. It was argued mainly on the ground that the railway, being incomplete and not yet opened to the public, was not a railway intended for the conveyance of passengers within the Act. In rejecting an argument similar to that advanced in the present case, Cockburn C.J. said: "The object of the legislature was obviously to prevent any disaster to those using the railway, and to punish those who put an obstruction in such a manner as was likely to cause disaster."

ROAD TRAFFIC

Driving while disqualified—provisional licence held—provisions not complied with

Stewart v. Paterson

Sheriff Court of Argyll at Campbeltown: Sheriff-Substitute R. B. Miller: 1959 S.L.T.(Sh.Ct.) 66.[8]

On September 9, 1958, Paterson was disqualified from holding or obtaining a licence to drive a motor-vehicle until he had passed the driving test, pursuant to section 6 (3) of the Road Traffic Act, 1934. Subsequently, he took out a provisional driving licence, pursuant to section 6 (4) of the Act. On March 15, 1959, he drove a vehicle on a road, but was unaccompanied by a qualified supervisor, and his car was not displaying "L" plates. He was charged with an offence under section 7 (4) of the Road Traffic Act, 1930.

Section 7 (4) provides that a person who drives a motor-vehicle on a road whilst disqualified shall be guilty of an offence. Section 6 (4) of the Road Traffic Act, 1934, provides that a person disqualified under the provisions of the section shall be entitled to obtain and to hold a provisional driving licence and to drive a motor-vehicle in accordance with the conditions subject to which the provisional licence is granted.

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[8] For the complainer: Procurator-Fiscal, Campbeltown. Paterson appeared in person.

Held, that Paterson was guilty of an offence under section 7 (4) of the Road Traffic Act, 1930. [D. C.]

Commentary. The proposition in the note to section 7 of the Road Traffic Act, 1930, in 24 *Halsbury's Statutes*, 2nd ed., 581, that "A person who is disqualified until he passes a test . . . is not subject to subs. (4) of this section while driving on a provisional licence," requires qualification. Such a person does become subject to section 7 (4) if he fails to comply with the conditions of the provisional licence. The problem is discussed in answers to correspondents in 119 J.P.J. 32 and 120 J.P.J. 623. It is respectfully submitted that the better construction is that adopted in the present case.

Taking and driving away motor-vehicle—larceny—proof of intent permanently to deprive the owner

R. v. Gibbs

Court of Criminal Appeal: Lord Parker C.J., Hilbery and Salmon JJ.: November 30, 1959.[9]

G. was convicted at quarter sessions of stealing a motor-vehicle and was sentenced to two years' imprisonment. He had pleaded guilty to another count of taking and driving away the same vehicle without the consent of the owner for which he was sentenced to six months' imprisonment, concurrent. At the trial the jury were directed: "If a man takes a motor-cycle, drives it away and then when seen by a police officer makes a run for it, a jury would, in the absence of any explanation by an accused man, be inclined to infer he had stolen it. There is evidence called before you which would entitle you in the absence of any explanation by the accused to draw the inference that he intended to steal." On appeal to the Court of Criminal Appeal:

Held, that it was perfectly clear that these two sentences could not stand; it was exactly the same event in each case with which the offences were concerned. The direction to the jury was wrong in that it was just as consistent with taking and driving away as with larceny and, accordingly, the conviction of larceny would be quashed. [H. P.]

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[9] For the appellant: *B. Woods* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Charles McCullough* (instructed by Blakesley & Rooth, Alfreton).

Commentary. The defect in the direction would appear to be that it did not make clear the requirement of "intent permanently to deprive" which distinguishes larceny from the offence under section 28 of the Road Traffic Act, 1930. No doubt the evidence referred to by the learned deputy-chairman did amount to a prima facie case of larceny, sufficient to leave to a jury, but only with a direction that they must not convict of larceny unless satisfied beyond reasonable doubt that the accused did intend permanently to deprive the owner of the car.

In *R.* v. *West* [1959] Crim.L.R. 789 it was suggested that there was a difficulty in the way of convicting a man both under section 28 and of larceny where he had done only one act of taking and driving away; and the court in the present case seems to have assumed that the two convictions could not stand together. Yet it is clear that the same act may amount to both crimes and, indeed, every case of larceny of a motor-vehicle by taking and driving it away would seem to be an offence under section 28 also; for every element of the statutory offence is also an essential ingredient of larceny. Moreover, it is not uncommon for an accused to be convicted on two counts where he has done only one act which amounts to two crimes. See, for example, the following cases: *R.* v. *Aberg* [1948] 2 K.B. 173 (aiding and abetting K. in the felony of being at large while a sentence of penal servitude passed on him was in force; being an accessory after the fact to the same felony and misprision of the same felony) *R.* v. *Smalley* [1959] Crim. L.R. 587 (fabrication of evidence with intent to mislead a judicial tribunal and fabrication of evidence with intent to pervert the course of justice); *Ross* v. *Rivenall* [1959] Crim.L.R. 589 (taking a vehicle without the consent of the owner and using a vehicle without there being in force a policy of insurance); *R.* v. *Long* [1959] Crim.L.R. 518 (attempted murder and assault occasioning actual bodily harm); *Johnson* v. *Fowler* [1959] Crim.L.R. 463 (driving without due care and attention and driving without reasonable consideration for other persons using the road); *R.* v. *Lankford* [1959] Crim.L.R. 209 (attempted rape and assault with intent to ravish). (In some of these cases convictions were quashed, but on other grounds, there being no suggestion that the two convictions could not stand together.)

It is clear that in some at least of the cases referred to, a defence of *autrefois acquit* or *convict* (or the analogous defence available after a summary trial) would have been available if the prisoners had been convicted and sentenced on one count or information and subsequently indicted or charged on the second count on information. It is a "well-established principle of our criminal law that a series of charges shall not be preferred, and where a party accused of a minor offence is acquitted or convicted he shall not be charged again on the same facts *in a more aggravated form*" (my italics). *R.* v. *Elrington* (1861) 1 B. & S. 688, 696 *per* Cockburn C.J.; and see *R.* v. *Miles* (1890) 24 Q.B.D. 423. The position appears to be different when two counts or two informations based on the same act are considered together by the jury or by the magistrates and sentence is imposed for both offences at the same time. In such a case it would seem clear that neither *autrefois acquit* or *convict*, nor any defence analogous thereto, is available.

The contrary seems, however, to be assumed not only in the present case and in *R.* v. *West*, but also in the recent decision of the Divisional Court in *R.* v. *Burnham, Bucks, Justices, ex p. Ansorge* [1959] 1 W.L.R.

1041; [1959] Crim.L.R. 852. In that case it seems to have been implicit in the remarks of the Lord Chief Justice that if the two convictions (for causing an unnecessary obstruction, contrary to regulation 89 of the Motor Vehicles (Construction and Use) Regulations, 1955, and under the London Traffic (Restriction of Waiting) (Station Parade) Gerrard's Cross Regulations, 1952) were based on the same act, the second conviction would have been liable to be quashed on appeal.

The court referred to *Welton* v. *Taneborne* (1908) 72 J.P. 419, where it was held by the Divisional Court that a conviction for driving a car in a manner dangerous to the public was a bar to a second information, based on the same facts, for driving a car at over 20 m.p.h., contrary to section 9 (1) of the Motor Car Act, 1903. The excessive speed had been taken into account as an element of danger in the first information. But this was a case where the accused had been convicted and sentenced before the prosecution sought to proceed against the accused on the second information. The court followed *Wemyss* v. *Hopkins* (1875) L.R. 10 Q.B. 378. In that case, the appellant, having been summarily convicted of and fined for striking the respondent's horse was subsequently charged, on the same facts, with assaulting the respondent. The second conviction was quashed. Blackburn J. said: "The defence does not arise on a plea of *autrefois acquit*, but on the well-established rule at common law, that where a person has been convicted and punished for an offence by a court of competent jurisdiction, *transit in rem judicatam*, that is the conviction shall be a bar to all further proceedings for the same offence, and he shall not be punished again for the same matter; otherwise there might be two different punishments for the same offence." This seems to be a case of two separate trials and to have no application to such a case as the present, where two counts are considered together by a jury and where, if separate sentences are imposed, they will doubtless be made to run concurrently. The principle does, however, explain the *Burnham JJ.* case for, in a magistrates' court, the defendant can only be called upon to answer one charge at a time unless he agrees to two charges being tried together: *Edwards* v. *Jones* [1947] 1 K.B. 659, 662 *per* Lord Goddard C.J. As the defendant in the *Burnham JJ.* case did not appear, she could not have agreed to the two charges being tried together, and therefore, the case was on all fours with *Welton* v. *Taneborne.*

Taking and driving away a motor-vehicle — person subsequently entering the vehicle

R. v. Stally

Court of Criminal Appeal: Barry, Diplock and Salmon JJ.: [1959] 3 All E.R. 814.[10]

On the night of February 14, 1959, W. drove a motor-van away from where it had been parked by its owner, and later in the night

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[10] For the appellant: *Kevin Winstain* (instructed by Registrar, Court of Criminal Appeal). For the Crown: *Charles McCullough* (instructed by Solicitor, Metropolitan Police).

W. and the appellant used the van to make a number of journeys. The appellant and W. were each charged, on indictment, with taking and driving away a motor-vehicle without lawful authority, contrary to section 28 (1) of the Road Traffic Act, 1930. W. pleaded guilty. The appellant pleaded not guilty.

In his summing-up to the jury the deputy chairman said that if the appellant had entered the van knowing that W. had taken the vehicle without the permission of the owner, the appellant would be guilty of the offence.

Held, that if the appellant had taken no part in the taking of the van, but had merely got into it subsequently, although he knew that W. had no permission to drive it, he would not have been guilty of an offence against section 28 (1) of the Road Traffic Act, 1930; that the summing-up amounted to a misdirection in law; and that the conviction must therefore be quashed.

Per Barry J.: "If the learned deputy chairman had made it clear that once the jury were satisfied that the appellant was a party to the taking, in the sense that the taking had been a joint enterprise, even though he himself was not present when the vehicle was actually removed, no complaint could possibly have been made. The difficulty, as we see it, is that the learned deputy chairman indicated to the jury that they would be entitled to find the appellant guilty of this offence on the mere ground, and the sole ground, that he entered the vehicle some time after it had been taken, knowing that the driver of the vehicle had, in fact, taken it and driven it away without the consent of the owner. [D. C.]

Commentary. As the evidence appeared to show that S. did not take the van personally he could be made liable only as an aider and abettor. In order so to convict him it would be necessary to prove that he was present aiding and abetting at the time when the crime was committed or that he had incited or procured its commission. Sometimes the courts have taken a rather liberal view as to the duration of the crime. In *R.* v. *Kelly and McCarthy* (1847) 2 Car. & Kir. 379 K. took some oats from P.'s sacks and placed them in a nosebag under a tram. After a few minutes M. came up and took the nosebag from under the tram. It was held that both could be convicted of larceny. Maule J. said it was all one transaction in which both had concurred and both had been present at some parts of it. Strictly speaking the larceny was complete at the instant of time when K. moved the oats with intent to steal them and at that instant M. was apparently neither present nor rendering assistance of any kind. The "transaction" evidently continued some way beyond the point at which there was a complete crime. On the other hand, in *R.* v. *King* (1817) R. & R. 332, where D. broke into a warehouse, stole butter and deposited it in the street thirty yards from the warehouse door, E., who then came to assist in carrying it off, was held not guilty as a principal in the larceny. A similar result was reached in *R.* v. *Kelly* (1820) Russ. & Ry. 421, where E. waited half a mile from the scene of a proposed theft and then received a horse stolen by D. The facts in the present case were apparently consistent with its being on the same side of the line as *R.* v. *King*.

A similar problem arises under section 5 (1) (*a*) of the Homicide Act, 1957. At what point in time does an accused person cease to be in course or furtherance of theft? *Cf. R.* v. *Jones* [1959] 1 Q.B. 29; [1959] Crim.L.R. 291.

SCOTS LAW

Defective libel—carnal knowledge of woman under care or treatment in asylum—knowledge not averred

Mack v. H.M. Advocate

High Court of Justiciary: Lord Justice-Clerk (Thomson), Lords Partick and Mackintosh: 1959 S.L.T.(Reports) 288.[11]

Mack was charged on indictment that he had, on four specified occasions, unlawfully and carnally known a woman who was a lunatic, duly certified as such under the Lunacy Acts, and who was then under care or treatment in an asylum. The libel did not aver that Mack knew that the woman was under such care or treatment.

By section 46 (1) (*a*) of the Mental Deficiency and Lunacy (Scotland) Act, 1913, it is an indictable offence for any person to have unlawful carnal knowledge of a woman or girl who is a defective under care or treatment in an institution or certified house, under circumstances which do not amount to rape but which prove that the offender knew that the woman or girl was under such care or treatment. Section 56 of the Act extends the provisions of section 46 to women or girls who are lunatics, duly certified as such under the Lunacy Acts, and who are under care or treatment in an asylum or other place of lawful detention for lunatics.

Held, that knowledge on the part of the accused that the woman was under care or treatment in an asylum or other place of lawful detention was of the essence of the crime, and that the indictment was accordingly irrelevant. [D. C.]

Commentary. For cases showing the practice of the English Court of Criminal Appeal in relation to defective indictments, see *Archbold*, 34th ed., § 922.

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[11] For Mack: *Cay* (instructed by Colin M. Mackay, W.S.). For the respondent: *Milligan, Q.C.* (Lord Advocate), *Wylie, A.-D.* (instructed by Lionel I. Gordon (Crown Agent)).

SENTENCE

Notice of previous convictions—conviction wrongly set out

R. v. Hesketh

Court of Criminal Appeal: Lord Parker C.J., Hilbery and Salmon JJ.: December 8, 1959.[12]

The court *held* that an order made under section 22 of the Criminal Justice Act, 1948, ought to be deleted where the notice of previous convictions under section 23 of the Act wrongly set out one of the sentences as three years' corrective training, whereas it was in fact three years' imprisonment. [H. P.]

Probation—breach of probation—" dealt with "

R. v. Porter

Winchester Quarter Sessions: Recorder J. F. E. Stephenson, Esq.: January 29, 1960.[13]

In September 1958 the defendant pleaded guilty to two counts of storebreaking and larceny and was placed on probation for three years. In December 1959 the defendant appeared at the Romsey Magistrates' Court and, having elected for summary trial, pleaded guilty to larceny; the magistrates committed him for sentence to the Hampshire County Appeals Committee. Before he appeared at the Appeals Committee, he was brought back before the Recorder for sentence for breach of the probation order. Section 8 (5) of the Criminal Justice Act, 1948, states: " Where it is proved to the satisfaction of the court by which a probation order . . . was made . . . that the person in whose case that order was made has been convicted and dealt with in respect of an offence committed during the probation period, . . . the court may deal with him, for the offence for which the order was made, in any manner in which the court could deal with him if he had just been convicted by or before that court of that offence."

Held, that the Recorder had no jurisdiction to deal with the breach of probation because although the defendant had been convicted of another offence during the probation period he had not been " dealt with " for that offence. " Dealt with " means punished or treated in any of the various ways which are prescribed for dealing with offenders finally such as orders for absolute or conditional discharge; that is why the word "sentence" was not used. The court was not satisfied that the section covers the case of committal in custody to quarter sessions for sentence or of any other order which disposes of the matter *vis-à-vis* the court dealing with a person, and makes it *functus officio*. [*Reported by a Barrister-at-Law*.]

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[12] The applicant did not appear and was not represented.

[13] For the prosecution: *Howard W. Aplin* (instructed by Godwin Bremridge & Clifton, Winchester). The defendant was not represented.

Commentary. The words "convicted and dealt with" were the subject of argument in *R.* v. *Green* [1958] 2 W.L.R. 569, but the point was not decided. Lord Goddard C.J. said that the words may mean that the magistrates have made some order, so that they are *functus officio*; or the words may mean convicted and sentenced, and therefore dealt with.

Road traffic—disqualification from driving—appeal—date from which disqualification should run

R. v. Weatherell

Court of Criminal Appeal: Lord Parker C.J., Cassels and Ashworth JJ.: January 25, 1960: *The Times*, January 26, 1960.[14]

W. was convicted at quarter sessions of dangerous driving on July 2, 1959, and was disqualified from driving for six months. The disqualification was suspended pending an appeal, but no appeal was lodged by July 12, when the time allowed for appeal expired. W. had subsequently lodged a notice of appeal out of time and, later, had abandoned his appeal, although no notice of abandonment had been lodged with the court. The appeal came before the Court of Criminal Appeal on January 14, when the appellant did not appear and was not represented, and the court ordered that the disqualification should run from that date. On application to the Court of Criminal Appeal to vary the time of expiration of the disqualification, W. contended that the disqualification began to run on July 12 (when the time for appeal expired) and that a subsequent application for leave to appeal could not alter that position: he had not, in fact, driven for a period of six months less thirteen days.

Held, that the sentence would be varied so that the disqualification would expire on February 6. That seemed to meet the justice of the case. [H. P.]

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[14] For the applicant: *Niall McDermot* (instructed by A. E. Wyeth & Co. for S. Garelick & Co., Cardiff).

Supervision order—whether two consecutive sentences, each of six months, constitute a sentence of twelve months or more

R. v. Mordanam

Court of Criminal Appeal: Lord Parker C.J., Hilbery and Salmon JJ.: December 1, 1959.[15]

M. pleaded guilty at a magistrates' court to two charges of obtaining money by false pretences. He was committed for sentence to quarter sessions under the provisions of section 29 of the Magistrates' Courts Act, 1952, and was sentenced by quarter sessions to nine months' imprisonment, consecutive, on each charge and the court made an order under section 22 of the Criminal Justice Act, 1948. Section 22 enables a court to order that an offender who is eligible shall for a period of twelve months from his discharge from prison be subject to supervision and applies where the court sentences the offender to a term of imprisonment of twelve months or more.

Held, that the question was whether the order under section 22 could stand. The opinion of this court was that consecutive sentences of nine months' imprisonment did not bring the case within the ambit of section 22. What was required was a sentence of twelve months or more and, here, each sentence was of less than twelve months. This application would, therefore, be treated as an appeal and the order under section 22 would be deleted. [H. P.]

SEXUAL OFFENCES

Attempted unlawful sexual intercourse with a girl under sixteen—availability of statutory defence

R. v. Collier

Hertfordshire Assizes: Streatfeild J.: October 8, 1959.

Collier was indicted with attempting to have unlawful sexual intercourse with a girl not under the age of thirteen but under the age of sixteen, contrary to section 6 (1) of the Sexual Offences Act, 1956.

Streatfeild J., having heard argument both on behalf of the prosecution and the accused, ruled that the statutory defence provided by section 6 (3) of the Sexual Offences Act, 1956, applied not only where intercourse had taken place, but also where intercourse had been merely attempted. The words " an offence under this section" included an attempt, and the argument that for the purposes of defining "a like offence" *ibid.*, s. 6 (3), differentiates between "an offence under this section" and "an attempt to commit one" could not be allowed to prevail over the absurdity of allowing the defence where the accused had succeeded in having intercourse but denying it where he had failed. [A. MACHIN, *Barrister-at-Law.*]

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[15] The applicant did not appear and was not represented.

Commentary. An attempt to commit any indictable offence, whether common law or statutory, is a common law misdemeanour. It is submitted that there can be no conviction for an attempt where, if the accused had completed his act, the result would not have been the crime which he was charged with attempting. "Steps on the way to the commission of what would be a crime, if the acts were completed, may amount to attempts to commit that crime, to which, unless interrupted, they would have led; but steps on the way to the doing of something, which is thereafter done, and which is no crime, cannot be regarded as attempts to commit a crime": *R.* v. *Percy Dalton* (1949) 33 Cr.App.R. 102. If the accused had completed his act in the present case, it would, owing to the availability of the statutory defence, not have been the crime he was charged with attempting. It is therefore submitted, with great respect, that, quite apart from any question of statutory interpretation, he was rightly acquitted according to the common law principles governing the common law misdemeanour of attempt.

SHOPS

Failure to close shop—open for viewing only—whether open for the service of customers

Ilford Corporation v. Harrison Gibson, Ltd.

Beacontree Magistrates' Court: December 3, 1959.[17]

Ilford Corporation prosecuted Messrs. Harrison Gibson, Ltd., for three offences of "being the occupiers of a shop known as the Mart, 1–7, Hainault Street, Ilford, who failed to close the said shop for the serving of customers at 8 o'clock in the evening, contrary to section 2 (1) (*b*) and 14 (2) of the Shops Act, 1950.

The facts were not substantially in dispute. The shop was open for viewing only from 7 p.m. to 9.30 p.m. on Tuesday evenings. Assistants were present and informed customers as to prices, hire-purchase terms, facilities for delivery and demonstrations of such things as washing machines, etc. No goods were sold and no orders taken.

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[17] For the defendants: *Miss Rose Heilbron, Q.C., E. B. McLellan* (instructed by Ernest Briggs & Co., Doncaster). For the corporation: Mr. K. Shaw, Solicitor to Ilford Corporation.

For the defence Miss Heilbron submitted that no offence had been committed. She cited the following cases: *Waterman* v. *Wallasey Corporation* [1945] 2 All E R. 187; *L.C.C.* v. *Freeman, Hardy & Willis* (1913) 77 J.P. 245; and the Canadian case of *R.* v. *Lee*, 66 D.L.R. 492, and sought to distinguish *Betta Cars, Ltd.* v. *Ilford Corporaiton* [1959] Crim.L.R. 861, in which judgment was delivered on October 8, 1959, by submitting that the *Betta Cars* case was concerned with a Sunday offence whereas Harrison Gibson, Ltd. was an "after 8 p.m." offence. She cited the Sunday Fairs Act, 1448, the Sunday Observance Act, 1627, the Sunday Observance Act, 1677, and the Shops (Sunday Trading Restriction) Act, 1936.

The court held, however, that it was bound by the decision in *Betta Cars, Ltd.* v. *Ilford Corporation* and imposed a fine of £2 in each case and £10 10s. costs to the prosecution.

The defence have given notice of their intention to ask for a case to be stated for the opinion of the High Court.

[H. GRAHAM BARROW, *Solicitor, Clerk to the Justices.*]

TRIAL

Election to be tried summarily—application to change—police evidence heard—trial begun

R. v. Bennett. Ex p. Radburn

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Hilbery and Pearson JJ.: *The Times*, November 28, and December 12, 1959.[18]

On November 16, 1959, the applicant appeared at Marlborough Street Police Court charged with attempted suicide. She was told that she was at liberty to consent to be tried summarily instead of by a jury, and she elected to be tried summarily. She pleaded Not Guilty. After a woman police officer had given evidence, the applicant was remanded for seven days for a medical report.

On November 23, the applicant was represented by counsel, who sought leave for her to change her election for summary trial, in order that she might be committed for trial by jury. The stipendiary magistrate held that he had no power to agree to this course, and leave was refused.

The applicant applied to the Divisional Court for writs of prohibition and mandamus, directed to the stipendiary magistrate, prohibiting him from trying her summarily, and directing him to hold a preliminary inquiry.

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[18] For the applicant: *Peter Sheridan* (instructed by Mr. Barry Ziff). For the Metropolitan Police Commissioner: *Paul Wrightson* (instructed by Solicitor, Metropolitan Police).

Held, dismissing the application, that since the magistrate had begun to try the case, he had no power to hold a preliminary inquiry.

Per Lord Parker C.J.: " It has been submitted that the woman police officer's evidence was merely formal evidence in connection with a remand and was not evidence in the case. Without deciding whether there could be formal evidence, as opposed to evidence in the case, it was clear that the police officer was giving evidence in the case." [D. C.]

Commentary. Section 24 of the Magistrates' Court Act, 1952, provides that a magistrates' court, having begun to try an information summarily, shall not thereafter proceed to inquire into the information as examining justices. Section 24 is subject to section 18 (5), which provides that where a court has begun to try summarily an offence which is both an indictable offence and a summary offence, it may discontinue the summary trial and inquire into the information as examining justices, at any time before the conclusion of the evidence for the prosecution. Attempted suicide is a common law misdemeanour and therefore an indictable and not a summary offence. Being included in Schedule I to the Magistrates' Courts Act, 1952, it may, however, be tried summarily in accordance with the provisions of section 19 of that Act.

In *R.* v. *Craske* [1957] 2 Q.B. 591, the Divisional Court held that a magistrate had not " begun to try " a case, within the meaning of section 24 until he had begun to hear evidence. In that case the proceedings in the magistrates' court had got no further than the accused's plea of not guilty, at which point the hearing was adjourned to enable him to be legally represented. *Craske* was followed by the Court of Criminal Appeal in *R.* v. *Ibrahim* (1957) 42 Cr.App.R. 38 when the proceedings had advanced a stage further in that the magistrate had heard not only the appellant's plea but also the opening speech for the prosecution. The present decision applies the rule laid down in those cases.

Committal for trial—charge specified in depositions defective — Indictment correct in form

R. v. Shakeshaft, Smith and Suttie

Central Criminal Court: His Honour Judge Block: January 21, 22, 1960.[19]

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[19] For the prosecution: *E. J. P. Cussen* and *A. Babington* (instructed by the Director of Public Prosecutions). For Shakeshaft: *Victor Durand, Q.C.*, *Miss R. Hare*. For Smith: *Peter Rawlinson, Q.C., M.P.*, and *W. A. B. Forbes*. For Suttie: *Lewis Hawser, Q.C.*, *James Burge* and *Clive Nicholls*.

The prisoners were charged under section 4 of the Explosive Substances Act, 1883. The indictment was in the correct form including the word "knowingly" but the caption to the depositions (Form M.C.A. 9 (a)) showed that the prisoners were charged "for that they did have in their possession or under their control an explosive substance to wit, etc., in such circumstances as to give rise to a reasonable suspicion that it was not in their possession for a lawful object. Contrary to section 4 of the Explosive Substances Act, 1883.

Mr. Peter Rawlinson, Q.C., on behalf of Smith, moved that the indictment be quashed on the ground that there had been no lawful committal. Referring to the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 2 (1), (2), (3), the Interpretation Act, 1889, s. 27, the Magistrates' Courts Act, 1952, s. 7, *R.* v. *Stewart & Harris* [1960] Crim.L.R. 57, and *R.* v. *Gee and others* (1935) 25 Cr.App.R. 198, he submitted that the statement of accused form (M.C.A. 10) showed that the accused were charged as "hereinbefore particularly set out" (*i.e.*, in the caption of depositions) with an offence unknown to law, that the defect in the proceedings was so vital that the indictment could not be rendered good by use of the court's power of amendment.

Mr. Durand, Q.C., and Mr. Hawser, Q.C., associated themselves with this submission on behalf of Shakeshaft and Suttie.

Mr. Cussen, in reply, argued that the form of charge as stated in the caption left no one in doubt and the depositions showed sufficient evidence to commit. The actual committal warrant, produced, contained the word "knowingly," the magistrate had in mind the full requirements of the section and the committal was good. Further, referring to *R.* v. *Smith and others* (1950) 34 Cr.App.R. 168, and *R.* v. *Morry* (1947) 31 Cr.App.R. 19, there was evidence on the depositions disclosing a prima facie case of an offence under section 4, and so, even though there might be no valid committal for trial for that offence, a count could be inserted in the indictment charging that offence in substitution for the invalid charge considered during the committal proceedings.

His Lordship quashed the indictment on January 21 and, on January 22, giving his reasons, referred to *R.* v. *Stewart & Harris*, and *R.* v. *Gee and others*, and the Magistrates' Courts Act, 1952, s. 7, and said that where the proceedings before the examining magistrates are out of order, everything that flows and emanates therefrom is equally of no effect, one must look at the face of the documents and, the charge disclosing no offence, there was no offence into which the magistrate was inquiring and consequently the proceedings were a nullity. Although the defendants were legally represented and although he was confident that the magistrate knew what he was doing, the liberty of the subject required the proper steps to be carried out.

During an unsuccessful application for costs it was revealed that the charge as recorded in the Court Register of the Committal Court contained the word "knowingly."

This pyrrhic victory, probably caused by an unnoticed clerical error, has been followed by leave being granted to sign a voluntary bill. Apart from perhaps some delay (a previous application for the case to go over to next session having been refused), obtained at considerable cost to all, little seems to have been gained.

Smith v. *Moody* [1903] 1 K.B. 56, *Halstead* v. *Clark* (1944) 60 T.L.R. 189, *Atterton* v. *Browne* [1945] K.B. 122, *Waring* v. *Wheatley* [1951] W.N. 569, and *Meek* v. *Powell* [1952] 1 K.B. 164, preclude rule 77 of the Magistrates' Courts Rules validating the omission of the word "knowingly." *Lomas* v. *Peek* [1947] All E.R. 574, can be distinguished as the use of the word "suffer" cured the omission of "knowingly and wilfully permitted" but it might be thought that a person who is legally represented and who has an objection to make and leaves it to such a late moment has waived the defect, *vide Atterton* v. *Browne*.

[C. B. ORR, *Barrister-at-Law*.]

Commentary. In *R.* v. *Gee* the court emphasised the importance of strict compliance with the statutory procedure on committal for trial, pointing out that, since 1933, this procedure had replaced presentment by a grand jury. Where there has been no lawful committal, any trial which takes place is a nullity.

By Rule 77 of the Magistrates' Courts Rules, documents made in connection with proceedings before a magistrates' court must describe the offence in ordinary language, "avoiding as far as possible the use of technical terms and *without necessarily stating all the elements of the offence*" and give "such particulars as may be necessary for giving reasonable information of the nature of the charge." This rule re-enacts provisions formerly in section 32 of the Criminal Justice Act, 1925. The precise effect of the rule does not appear to be very clear. The omission of "knowingly and wilfully" in *Lomas* v. *Peek* was justified only because it was held that "permitting" (which was referred to) necessarily included knowledge and wilfulness—*i.e.*, because all the elements of the offence *were* specified.

In common law crimes it is obviously not necessary to state all the elements of the offence, *e.g.*, in larceny there is no need to specify that the taking be done "fraudulently and without a claim of right"; but in the case of statutory offences it is difficult to see how the accused can be given "reasonable information of the nature of the charge" unless all the elements of it are specified.

Jury—coercion—threat to keep jury all night if no verdict within ten minutes—effect

R. v. McKenna and others

Court of Criminal Appeal: Cassels, Donovan and Ashworth JJ.: January 15, 1960: *The Times*, January 16, 1960.[20]

The appellants were convicted at assizes, B. of larceny and taking and driving away a motor-van, and the others of being accessories after the fact in respect of the same theft. At the conclusion of the evidence and the summing-up the jury retired to consider the verdict and, after more than two hours, were called back into court by the learned judge. The learned judge, having previously indicated to the jury that he had an appointment which would necessitate his leaving the court at a stated time, addressed the jury as follows: "I have disorganised my travel arrangements out of consideration for you pretty considerably already. I am not going to disorganise them any further. In ten minutes I shall leave this building and if, by that time, you have not arrived at a conclusion in this case you will have to be kept all night and we will resume this matter at a quarter-to-twelve tomorrow. I do not know, and I am not entitled to ask—and I shall not ask—why in a case which does not involve any study of figures or documents you should require all this time to talk about the matter. May I suggest to you that you go back to your room, that you use your common sense, and do not worry yourselves with legal quibbles. That is what you are brought here for: to use your common sense, bring a bit in from outside. There it is, members of the jury." The jury thereupon retired again and returned six minutes later with verdicts of guilty. On appeal to the Court of Criminal Appeal:

Held, allowing the appeals, that it was a cardinal principle of our criminal law that the jury should deliberate in complete freedom, uninfluenced by any promise, unintimidated by any threat. The jury stood between the Crown and the subject and was still one of the main defences of personal liberty. It might well be that the learned judge was understandably irritated by the inconvenient slowness of the jury in reaching a verdict in what he thought was a plain straightforward case. To experience such irritation was understandable; to express it in the form of such a threat (and it could be called nothing else) to the jury was insupportable. In this case the ultimatum no doubt fell with added force upon the jury, since two of them were women; and in any event a jury was never locked up in the jury room all night but, if necessary, was accommodated in an hotel. This court had been asked to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, on the ground that the evidence against the appellants was so overwhelming that, despite the irregularity, the jury could not have failed to convict. However, it was, at the very least, a reasonable inference that the jury in that last ten minutes were concentrating, not so much upon the evidence as upon the inconvenience and discomfort with which they had been threatened. In those circumstances this court did not think it right to resort to the proviso to section 4 (1). Further, this court would not order a *venire de novo* because the trial was not in the true sense of the word a nullity. The principle that the jury should feel free to deliberate for as long as they needed was of fundamental importance and, accordingly, these appeals would be allowed and the convictions quashed. [H. P.]

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[20] For the appellants McKenna and McKenna: *J. J. Deave* (instructed by the Registrar, Court of Criminal Appeal). For the appellant Busby: *P. G. Hughes* (instructed by the Registrar Court of Criminal Appeal). For the Crown: *T. R. Fitzwalter Butler* (instructed by R. A. Young & Pearce, Nottingham).

Commentary. There is very little modern authority on cases of this kind but it is well understood that juries must not be subjected to coercion of any kind when considering their verdict. The reaction of laymen generally to the present case, as well as the absence of modern authority in itself, indicate how widely this principle is appreciated and respected. The judgment in the present case is an invaluable formulation of the principle which will, no doubt, take its place in the books beside such celebrated authorities on jury trial as *Bushell's Case*, 6 How.St.Tr. 951. The standard of the judiciary being what it is, the present judgment is likely to be appealed to on only the rarest occasions; but it is nonetheless important for that.

Summing-up and direction to jury

R. v. Mitchell and Jones

Court of Criminal Appeal: Lord Parker C.J., Hilbery and Salmon JJ.: December 8, 1959.[21]

M. and J. were convicted at assizes of non-capital murder. Both men had made statements to the police admitting going to a shop where the proprietor was robbed and struck with an iron bar. Each man blamed the other and alleged that the other had struck the blow which killed. The appellants were found not guilty of capital murder but guilty of murder. On appeal to the Court of Criminal Appeal the summing-up was criticised and, in particular, the following passage: " Robbery was undoubtedly the primary purpose of these two men, but is there any escape from the conclusion that when they went into that shop, admittedly to force their way in if necessary and to take from the old man his money, can you escape the conclusion that they, even stupid, brutish men like these, must have contemplated resistance and that force would be necessary? Have you any doubt that both of them had in mind the possibility of resistance and the determination to use force to overpower that resistance? "

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[21] For the appellant Mitchell: *M. A. B. King-Hamilton, Q.C., R. S. Tumim* (instructed by the Registrar, Court of Criminal Appeal). For the appellant Jones: *E. Ryder Richardson, Q.C., C. N. Pitchford* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *G. G. Baker, Q.C., I. B. Fife* (instructed by the Director of Public Prosecutions).

Held, dismissing the appeal, that these were undoubtedly strong words and words adverse to the prisoners. To say that " robbery was undoubtedly the primary purpose " and that these men had gone " admittedly to force their way in if necessary and to take from the old man his money," when J.'s case was that he had gone to the shop to buy cigarettes and had no intention of being a party to robbery was a strong indication of the learned judge's view. Again, the words " can you escape the conclusion?" and " have you any doubt ? " were strong words. But a judge was entitled to express his own view, and to express his own view strongly, provided that he left it fairly to the jury to decide the issue on the facts of the case on a proper direction. Here the judge had directed the jury that issues of fact were matters for them and had left the matter fully and fairly to the jury. The appeals would, therefore, be dismissed. [H. P.]

Commentary. English law allows the judge very considerable latitude in commenting upon the evidence. The rule is stated in *R.* v. *O'Donnell* (1917) 12 Cr.App.R. 219 as follows:

> " . . . a judge, when directing a jury, is clearly entitled to express his opinion on the facts of the case, provided that he leaves the issues of fact to the jury to determine. A judge obviously is not justified in directing a jury, or using in the course of his summing up such language as leads them to think that he is directing them, that they *must* find the facts in the way which he indicates. But he may express a view that the facts ought to be dealt with in a particular way, or ought not to be accepted by the jury at all. He is entitled to tell the jury that the prisoner's story is a remarkable one, or that it differs from accounts which he has given of the same matter on other occasions."

The English rule was forcibly criticised by Serjeant Sullivan (*The Last Serjeant* 288):

> " In many of the American states the judge is by statute prohibited from indicating his opinion on the issues of fact in the case. I thoroughly approve of this. Speeches on behalf of the prosecution delivered from the Bench in my own country had created a

> rampart against the conviction of guilty men. It is no concern of a judge whether a man be convicted or acquitted. With the standard of duty everywhere evidenced by the British juror, I have no hesitation in saying that he is far more likely to arrive at a true conclusion of fact left to his own judgment than he is when influenced by the exhortations from the Bench. I once gave some offence to one of my judicial friends at the Old Bailey when I suggested to the registrar of the court that he should ask the foreman of the jury, did they find for his Lordship or against him? But in truth that is the issue left to the jury when the judge takes sides for the prosecution. Either the jury must do as the judge has implored or they must slap him in the face, and they are deprived of moral freedom to exercise their unfettered judgment when doing so might involve a slight upon a judicial officer."

This criticism may perhaps be answered by remarking that the rule forbidding comment by the judge which prevails in many American states and of which Serjeant Sullivan approves is one of the most harshly criticised rules of American criminal procedure. *Cf.* [1955] *Cambridge Law Journal* 80 *et seq.* The fact is that in many cases it is impossible for the judge to sum up properly without revealing his opinion to the jury. Thus, that great criminal judge, Stephen J. wrote (*History of Criminal Law*, i, 455):

> " I also think that the judge who forms a decided opinion before he has heard the whole case, or who allows himself to be in any degree actuated by an advocate's feelings in regulating the proceedings, altogether fails to discharge his duty, but I further think that he ought not to conceal his opinion from the jury, nor do I see how it is possible for him to do so if he arranges the evidence in the order in which it strikes his mind. The mere effort to see what is essential to a story, in what order the important events happened, and in what relation they stand to each other must of necessity point to a conclusion. The act of stating for the jury the questions which they have to answer and of stating the evidence bearing on those questions and showing in what respects it is important generally goes a considerable way towards suggesting an answer to them, and if a judge does not do as much at least as this he does almost nothing."

The one of the appellants who struck the blow was, no doubt, guilty of capital murder, the killing being done in the course of furtherance of theft, under section 5 (1) (*a*) of the Homicide Act, 1957. The other was not guilty of capital murder by virtue of section 5 (2). If it was impossible to prove which of the appellants struck the blow, clearly both would have to be acquitted of capital murder: *R.* v. *Richardson* (1785) 1 Leach 387.

Principles of Punishment

Sentences in the Court of Criminal Appeal

Prepared by HENRY PALMER, *Barrister-at-Law*

Preventive detention

In R. *v.* FAULKNER the court (Lord Parker C.J., Cassels and Ashworth JJ.: January 25, 1960) affirmed a sentence of seven years' preventive detention. F. had pleaded guilty (with another man) at a magistrates' court to stealing some cameras, binoculars and other property in a dwelling-house, and had been sentenced by quarter sessions. The value of the property was £501. F., who was a man of thirty years of age, had twenty-three previous convictions. The court stated that the only thing which could be said in F.'s favour against the sentence of preventive detention was the fact that he was only just thirty years of age, and this court was very loth to sentence such a man to preventive detention. But this man was a hardened criminal. Not only had he been committing offences for twenty years and had been before the courts on no less than twenty-three occasions, but also the Prison Commissioners' report was in extraordinarily strong language, namely: " He is a nasty truculent man, thoroughly set in his ways, and I can see nothing but a long criminal record in front of him. Although he is still young, there is no doubt he is an habitual criminal. . . ." This court had no doubt that, despite F.'s age, preventive detention was the only possible sentence.

Preventive detention

In R. *v.* CLARKE the court (Lord Parker C.J., Cassels and Ashworth JJ.: January 25, 1960) reduced a sentence of eight years' preventive detention to one of two years' imprisonment. C. had pleaded guilty at a magistrates' court to stealing five dresses, valued at £4 9s. 7d., from a shop, and was sentenced by a Crown court. C., who was a man of forty-five years of age, had eleven previous convictions. The court stated that this was in some ways a curious case. C.'s record up to 1940 was particularly bad: he had been put on probation, sent to Borstal and had had three sentences of hard labour, twelve months, twelve months and three months. In 1940 C. married and from then until 1957 he avoided prison, although he had been fined and bound over for three offences of larceny and one of being on enclosed premises. However, he had been sent to prison for three months in 1957 for larceny and in 1958, for further offences of larceny, for eighteen months. There was no doubt that on the last occasion the recorder had warned C. that he would be sent to preventive detention next time. However, the court had received a letter from C.'s wife in which it was said that C. was worried about money. The letter ended by saying: "Owing to his deafness he did not hear [the recorder's] warning in 1958, but I guarantee that he will not get into trouble again." This court felt that they could exercise leniency in this case, and that having regard to the long gap between 1940 and 1957, it would be wrong to treat this man as an habitual criminal. Accordingly the sentence would be reduced to one of two years' imprisonment. It might well be that C. did not hear the warning of preventive detention in 1958, but next time there would be no excuse and he would go to preventive detention.

Imprisonment

In R. *v.* CAIRNS the court (Lord Parker C.J., Cassels and Ashworth JJ.: January 25, 1960) reduced a sentence of five years' imprisonment to one of three years' imprisonment. C. had been convicted at quarter sessions of stealing a cash box containing £16 from a market stall. C., who was a man of thirty-two years of age, had six previous convictions which included offences of shopbreaking, larceny and embezzlement. In August 1957 he had been sentenced to six months' imprisonment for stealing a handbag, and his last conviction was in January 1958 for breaking into an hotel bar and stealing, when he was sentenced to two years' imprisonment. The present offence was committed about a month after his release from prison. The court stated that they felt, looking at the nature of the offence alone, that five years was certainly a severe sentence and seemed largely, if not wholly, to have been imposed by reason of C.'s previous record. Indeed the deputy chairman had said, when sentencing the prisoner: "You have had warning after warning in the past, but you have not profited by them, and it seems to us that we must deal with you as we deal with any other public nuisances." This court felt that, since the sentence was one of imprisonment and not preventive detention, five years was excessive for stealing £16. Accordingly, the sentence would be reduced to one of three years' imprisonment.

Fine

In R. *v.* MACPHERSON the court (Cassels, Donovan and Ashworth JJ.: January 13, 1960) substituted a fine for a sentence of nine months' imprisonment. M. had pleaded guilty at assizes to having unlawful carnal knowledge of a girl under the age of sixteen. M., who was a man of twenty-five years of age, was previously of good character. The court stated that the sentence was one which ought to be changed. The circumstances placed before the court were these: that this man, who was in the Royal Air Force, would lose his gratuity of possibly £4,000; that the girl was over sixteen at the time of trial and she was tall and well built so that she might easily have been mistaken for eighteen years of age; that the offence arose as a result of a chance meeting; that the girl herself regarded herself as very much to blame, having led M. on; and that M. had undertaken any financial liability which might arise as a result of this young woman's pregnancy. M. was a married man with two children but, whilst this fact indicated a serious moral lapse on M.'s part, it did not make him any more criminally liable than if he had been a single man. In view of the circumstances and of the fact that M. had been in prison since October 13, 1959, this court would substitute a fine of £20 for the sentence of nine months' imprisonment.

*Acts and Orders**

Animals

Notwithstanding the provisions of the principal order (S.I. 1957, No. 787) under which a local authority may grant a licence authorising sales by auction of store poultry to be held at any time except in October, November or December in any year, that power shall not be exercised so as to authorise such a sale in January, February or March 1960. Operative December 31, 1960. LIVE POULTRY (RESTRICTIONS) AMENDMENT NO. 2 ORDER, 1959 (S.I. No. 2193) (3d.).

Criminal Procedure

The fee allowable to the solicitor assigned under an appeal aid certificate is increased as from January 1, 1960. APPEAL AID CERTIFICATE (FEES AND EXPENSES) RULES, 1959 (S.I. No. 2239) (2d.).

Dangerous Drugs

Certain drugs are removed from and certain drugs are brought within the scope of the provisions of the Dangerous Drugs Act, 1951.

Norcodeine and Normorphine are removed from the scope of the provisions of section 11 (1) of the Act. Part III of the Act, which provides that it shall not be lawful to import or export any drug to which that Part applies except under licence, and empowers the Secretary of State to make regulations for the purpose of preventing the improper use of such drugs, is applied to certain drugs specified in the Schedule to the second of the Orders named below, and to the salts of those drugs and any preparation, admixture, extract, or other substance containing any proportion of them. The drugs are Benzethidine, Dimenoxadole, Furethidine, Norcodeine, Normorphine and Phenazocine. Both Orders operative January 1, 1960. DANGEROUS DRUGS ACT, 1951 (RELAXATION) Order, 1959 (S.I. No. 2212) (2d.), and (APPLICATION) ORDER, 1959 (S.I. No. 2211) (3d.).

For penalties for contraventions, see section 15 of the Dangerous Drugs Act, 1951.

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* Prepared by F. Maurice Drake, *Barrister-at-Law*.

London Traffic

The principal Order governing parking in St. Marylebone (S.I. 1959, No. 429) is amended by providing (1) that all the parking places designated by that Order, instead of only some of them, may, subject to the provisions of that Order, be used also for the leaving of goods vehicles and (2) that the hours during which the parking places designated by that Order are to be in operation for the leaving of vehicles are extended to include the time between 8.30 a.m. and 1.30 p.m. on Saturdays. PARKING PLACES (ST. MARYLEBONE) (NO. 1, 1959) (AMENDMENT) ORDER, 1959 (S.I. No. 2102) (3d.), operative December 17, 1959; (AMENDMENT No. 2) ORDER, 1959 (S.I. No. 2103) (3d.), operative April 4, 1960.

For penalties for contraventions, see section 22 of the Road Traffic Act, 1956.

The following Orders have been made detailing prescribed routes: S.I. No. 2229 (Shoreditch) (3d.); 2230 (Southgate) (2d.).

The following Order has been made prohibiting cycling on footpaths: S.I. No. 2228 (Chorleywood) (3d.).

Magistrates' Courts

The following Order has been made in respect of petty sessional divisions: S.I. No. 2149 (Lancashire) (3d.).

Merchant Shipping

The Load Line Rules, 1941 (S.R. & O. 1941, No. 1464) and all subsequent amending Rules are revoked and consolidated with minor amendments. Operative February 1, 1960. LOAD LINE RULES, 1959 (S.I. No. 2238) (3s. 6d.).

Mines and Quarries

The provisions of section 116 of the Mines and Quarries Act, 1954 (which deals with the notification of accidents in mines and quarries) are extended to certain special classes of dangerous occurrences. The manager of a mine or quarry must, when there is such an occurrence as is specified in these Orders give notice thereof to the inspector for the district and to the employees' nominee, whether or not death or serious bodily injury has been caused. Occurrences which occur at any place in a quarry or on the surface of a mine where certain building operations are being carried on and which arise out of those building operations, do not have to be notified (Article 4). Certain occurrences in connection with breathing apparatus, a smoke helmet or other apparatus securing the same purpose have to be notified only when they are at mines of coal, stratified ironstone, shale or fireclay. The Orders replace the provisions of the Orders of 1957 (S.I. 1957, No. 1095) and 1906 (S.R. & O. 1906, No. 934), which are revoked. Both operative January 1, 1960. MINES (NOTIFICATION OF DANGEROUS OCCURRENCES) ORDER, 1959 (S.I. No. 2117) (3d.); QUARRIES (NOTIFICATION OF DANGEROUS OCCURRENCES) ORDER, 1959 (S.I. No. 2118) (3d.).

For penalties for contraventions see sections 155, 160, 161 and 162 of the Mines and Quarries Act, 1954.

The Minister of Power has made regulations under the Mines and Quarries Act, 1954, governing the use of explosives in quarries and in all mines except mines of coal, stratified ironstone, shale and fireclay. The firing of shots in quarries and below the surface in mines is prohibited except by persons not less than twenty-one years of age specially appointed for that purpose by the manager; save that in the case of quarries this prohibition does not apply to persons previously appointed under the earlier regulations and rules now revoked by Article 4. Detailed provisions are made as to the storage and method of dealing with equipment, apparatus and material for firing shots; the method of dealing with defective electric shot-firing apparatus; the placing, drilling, cleaning, charging and stemming of shot-holes and the firing of shots generally. Special provisions deal with misfires and the general precautions to be taken in such an event, and there must at all times be in force a scheme specifying the procedure to be followed after a misfire. An Inspector is empowered (by reg. 3) to exempt any mine or quarry or any part of any mine or quarry from the application of any provision of these regulations, provided that he is satisfied that the safety of any person employed at the mine or quarry will not be endangered thereby. All special regulations made under the 1954 Act and in force at certain individual mines and quarries relating to the supply, storage or use of blasting materials or devices and all special rules relating to explosives established at particular mines and quarries under the Metalliferous Mines Regulation Act, 1872 (as applied to Quarries by the Quarries Act, 1894) and continued in force as regulations by the 1954 Act, are revoked. MISCELLANEOUS MINES (EXPLOSIVES) REGULATIONS, 1959 (S.I. No. 2258) (6d.), operative April 1, 1960. QUARRIES (EXPLOSIVES) REGULATIONS, 1959 (S.I. No. 2259) (7d.), operative February 1, 1960.

For penalties for contravention, see sections 155, 160, 161 and 162 of the Mines and Quarries Act, 1954.

Police

Provision is made for increases in widows' pensions and children's allowances in England and Wales and also in Scotland. Part I of these Regulations amends the Police Pensions Regulations, 1955 (S.I. 1955, No. 480; (Scotland S.I. No. 485) which relate to awards made on or after April 25, 1955; Part II amends the Police Pensions Regulations, 1949 (S.I. 1949, No. 1241; (Scotland) S.I. 1949, No. 1240) which relate to awards made between July 1, 1949, and April 25, 1955; and Part III amends the Police Pensions Regulations, 1948 (S.I. 1948, No. 1531; (Scotland) S.I. 1948, No. 1530) which relate to awards made before July 1, 1949. The amendments increase the flat rates by reference to which the amounts or maximum amounts of certain widows' pensions and children's allowances are determined (Regs. 6, 8 (1), 11 (3), 12, 14 (1), 18, 19 (1), 22, 24 (1), 29 (*a*), 31 (1), 34 and 36 (1) and provide for the increase of widows' pensions and children's allowances, other than flat-rate awards, by an amount calculated by reference to the Pensions (Increase) Act, 1959 (Regs. 7, 17 and 30). Operative August 1, 1959. POLICE PENSIONS REGULATIONS, 1959 (S.I. No. 2175) (6d.); (SCOTLAND) REGULATIONS (S.I. No. 2181) (6d.).

The Police Regulations, 1952 (S.I. No. 1704) are amended. The annual leave of a member of a police force below the rank of superintendent who has the prescribed number of years' service is increased by two days (Regs. 1 and 5); the plain clothes allowance is increased (Reg. 2); the temporary duty allowance is extended to a superintendent other than one in receipt of a payment for acting as the deputy chief officer of police (Reg. 3); and a police authority is enabled to grant uncertified sick leave for a period not exceeding three days (Reg. 4). Operative January 1, 1960. POLICE (NO. 4) REGULATIONS, 1959 (S.I. No. 2274) (3d.). Identical provisions are made amending the Police (Scotland) Regulations, 1956 (S.I. 1956, No. 1999) with the further amendment which removes the exemption of an inspector in sole charge of a sub-division from the provisions for the normal daily period of duty (para. 1). Operative January 1, 1960. POLICE (SCOTLAND) AMENDMENT (NO. 3) REGULATIONS, 1959 (S.I. No. 2257) (3d.).

Revenue

The lists of banks and other persons authorised to deal in gold and foreign currency, and the list of authorised depositaries with whom certain securities are required to be deposited, under the provisions of the Exchange Control Act, 1947, are amended. Both operative January 1, 1960. EXCHANGE CONTROL (AUTHORISED DEALERS) (AMENDMENT) (No. 3) ORDER, 1960 (S.I. No. 2252) (2d.); (AUTHORISED DEPOSITARIES) (AMENDMENT) (No. 3) ORDER, 1959 (S.I. No. 2253) (2d.).

For penalties for contraventions, see Schedule 5 to the Exchange Control Act, 1947.

Road Traffic

The Motor Vehicles (Construction and Use) Regulations, 1955 (S.I. No. 482) are further amended by (a) exempting from certain provisions of those regulations relating to trailers (for example that they shall be fitted with springs, brakes and mudguards) towing implements which are being drawn when not attached to another vehicle except the one drawing them, subject to the condition that this exemption shall not apply during the hours of darkness and shall apply only while the drawing vehicle is not exceeding 20 m.p.h.; (b) providing that the provisions relating to broken-down vehicles and vehicles being drawn in the exercise of a statutory power to remove vehicles from roads shall apply also when these vehicles are being towed away with the aid of towing implements; (c) extending the cases in which broken-down vehicles which are being drawn in consequence of the breakdown are exempted from the requirements of those regulations relating to trailers and (d) exempting vehicles which are being drawn in the exercise of a statutory power to remove vehicles from roads from, or applying to such vehicles, certain provisions of these regulations, relating to trailers. Operative January 9, 1960. MOTOR VEHICLES (CONSTRUCTION AND USE) (AMENDMENT) (No. 2) REGULATIONS, 1959 (S.I. No. 2231) (3d.).

For penalties for contraventions see rule 104 and sections 111 and 113 of the Road Traffic Act, 1930.

The Pedestrian Crossings Regulations, 1954 (S.I. No. 370) are further amended by providing that, where the appropriate local authority is satisfied that the presence of a pedestrian at the end of an uncontrolled crossing where there is a beacon, or on a refuge on such a crossing on which refuge there is a beacon, should be better indicated at night, the authority shall provide a lamp beneath the beacon for this purpose. Operative January 19, 1960. PEDESTRIAN CROSSINGS (ENGLAND AND WALES) (AMENDMENT) REGULATIONS, 1959 (S.I. No. 2296) (3d.).

Section 25 of the Road Traffic Act, 1956, was brought into operation on January 1, 1960, and section 13 is to come into operation on March 1, 1960. Section 25 empowers the Minister to make provision for imposing and recovering charges for parking vehicles in Royal Parks. Section 13 deals with the regulation of cycle racing on highways. ROAD TRAFFIC ACT, 1956 (COMMENCEMENT No. 9) ORDER, 1959 (S.I. No. 2021) (2d.).

Scotland

The Fluorine in Food Order, 1947 (S.R. & O. 1947, No. 1134) is replaced in its application to Scotland. The regulations prescribe reduced maximum limits for the fluorine content of acidic phosphates used for food purposes and of foods containing acidic phosphates. Operative March 14, 1960. FLUORINE IN FOOD (SCOTLAND) REGULATIONS, 1960 (S.I. No. 2182) (3d.).

For penalties for contraventions, see Regulation 6 of these Regulations.

Sea Fisheries

There is to be no close season for grey seals in Scotland (other than certain specified excepted areas) during the period of twelve months from December 4, 1959. During that period the killing of grey seals in Scotland is prohibited except by persons holding permits granted by the Secretary of State. The Regulations specify the conditions of permits generally and the means by which the seals are to be killed. The Grey Seals Protection Act, 1932 (22 & 23 Geo. 5, c. 23) is modified accordingly under the provisions of section 1 of that Act. GREY SEALS PROTECTION (SCOTLAND) (SUSPENSION OF CLOSE SEASON) ORDER, 1959 (S.I. No. 2078) (3d.).

For penalties for contravention, see section 2 of the Grey Seals Protection Act, 1932.

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 11 *New Fetter Lane, London, E.C.4." The questions of readers only are answerable in the Review. All questions should be submitted in triplicate. The Publishers cannot accept any responsibility for the correctness of the replies.*

66. *False pretences and obtaining credit by fraud*

A building agent employed by "A" complained to the effect that on April 23 he had visited a local garage where his firm obtained petrol on credit. On collecting the credit tickets on behalf of "A," he discovered that one ticket showed super grade petrol had been obtained, whereas "A" are only authorised to draw dominion petrol, which is a cheaper grade. He made inquiries from his employees, three of whom are the only persons entitled to draw petrol for "A," and they all denied obtaining the super grade petrol. He became suspicious and reported the matter to the police.

The garage in question has a system whereby all credit and cash sales are recorded on a ticket machine. On the tickets there is a column for recording the name of the firm obtaining credit, also a column for the signature of the person drawing the petrol.

Inquiries were made by the police and it was discovered that a man "B" (not an employee of "A") had obtained various amounts of super grade petrol on several occasions. His method was to go to the garage with his car and ask the petrol pump attendant to put a number of gallons in the tank. The petrol was issued and afterwards he said to the attendant: "Book it down to 'A.'" The attendant then made out the credit ticket to "A" and the man "B" signed on the ticket. On other occasions the same procedure had been followed by "B" but the signature had been varied.

"B" was traced and interviewed and admitted that he was responsible for obtaining the petrol. He further stated that he knew that "A" had three drivers who were authorised to draw petrol on credit. He had a rough idea of their names and stated that when he signed the credit tickets he endeavoured to sign a name which he thought was similar to one of "A" 's drivers.

Much discussion has taken place as to what offence or offences this man has committed, and it has been brought down to one or more of the following four offences: Obtaining credit by fraud

—Debtors Act, 1869, s. 13; False pretences—Larceny Act, 1916, s. 32; Larceny by a trick—Larceny Act, 1916, s. 2; or Forgery—Forgery Act, 1913, s. 7.

In all cases the petrol was issued to "B" before the credit ticket was made out. The signatures on the tickets bear no resemblance whatsoever to the signatures of the drivers employed by "A," and in fact are illegible.

I am of the opinion that the offence committed could be one of credit by fraud or false pretences. [G. W.]

ANSWER

There is not the offence under section 13 of the Debtors Act, 1869, because although B by fraud incurs a debt or liability, he does not obtain credit, since credit was given to A, and not to B.

On the other hand, it is the misdemeanour under section 32 of the Larceny Act, 1916, because by the false pretence that he was duly authorised by A, B obtained full ownership of the petrol in question. Since he obtained full ownership by his trick, it is not larceny by a trick—see *R.* v. *Pear* (1779) 1 Leach 212.

On B's own admission, his intention in signing the credit ticket with an undecipherable name was to make the pump attendant think that he (B) was one of A's authorised employees. However, it cannot be said that his intention was to make the attendant think that the ticket was signed by anyone other than the person who did in fact sign it—*i.e.*, the man writing in the attendant's presence. In such circumstances, it has been held, there is no forgery—see *R.* v. *Martin* (1879) 5 Q.B.D. 34. It is, however, possible that the case might not be followed today in view of the judgment in *R.* v. *Hopkins and Collins* (1957) Cr.App.R. 231. [D. W. E.]

Letters to the Editor

Prosecuting officer: compellability of Defendant's Wife

Sir,

With reference to the article in the December issue, entitled "Prosecuting Officer" by Christopher Williams, I should be obliged if further information could be given concerning the authority of the competence and compellability of a husband or wife to give evidence against the other arising from the inflicting of personal injury under the rule of common law.

After reading the article under the title "Competence and Compellability of Defendant's Wife" at page 816 of the December issue, I am now left with the impression that a husband or wife can only give evidence for the prosecution against the other where the offence charged, arising out of the inflicting of personal injury, is tried on indictment only.

In Stone's *Justices' Manual*, under Part III—Evidence, sub-title "Competence of Husband and Wife," the following is quoted: "In any case of personal injury or assault committed by the husband or wife against each other, it is the invariable and well settled practice to receive the evidence of the injured party against the other." As Stone's *Justices' Manual* is looked upon as a directive to summary courts, it would appear from the quotation as given above that such evidence is admissible in a court of summary jurisdiction.

I should, therefore, be obliged if you would enlighten me as to any authority which states that such evidence can only be admitted by the prosecution where the offence is one charged on indictment.

Yours faithfully,

A. B.

Lichfield

[Christopher Williams writes: With the very greatest respect to the learned editor of Stone's *Justices' Manual*, to a passage on page 359 of the 91st edition of which your correspondent refers, it is by no means certain that the law is quite so wide in effect as is suggested. The proposition that a wife is both a competent and a compellable witness as against her husband charged with inflicting personal injury on her is, of course, a very old one. But there are very few decisions to clarify it. One might refer your correspondent to such cases as *Lord Audley's Case* (1631) 3 St.Tr. 401, or *Leach* v. *Rex* (1912) 7 Cr.App.R. 157; but he will probably conclude that they turn mainly on the question whether competency necessarily leads to compellability, rather than upon the circumstances which render a wife competent.

Even the most recent case, *R.* v. *Lapworth* [1930] 1 K.B. 117, which is relied on in the passage in *Stone's* to which your correspondent refers, does not help very much in establishing when a wife is competent against her husband; all it really decides is that, if the wife is competent by common law, as opposed to statute, then she is compellable. In that case the inference is that it is the infliction of some form of violent and criminal injury on the wife by the husband which renders her a competent witness. Since the sort of injury referred to in the few available cases, both in the arguments and in the judgments, appears to be associated with violence, such as attempted murder, rape, grievous bodily harm and so on, then it appears likely, to the writer at least, that the only kind of trial in which the compellability of the injured wife is likely to arise is trial on indictment. Certainly some of the older authorities indicate this, *e.g.*, 2 Hawk. c. 46, ss. 77, 80, 81; 1 Hale 301. It is realised, of course, that such views were formulated at a time when the criminal jurisdiction of the magistrates was very different from what it is today.

Perhaps the true position may be that, in theory at any rate, a wife is just as compellable a witness in the magistrates' court as in the sessions or assizes, but that the point is likely to arise, generally speaking, only in the higher courts, because the sort of injury likely to render her compellable is probably triable only in the higher courts.

And it is the view of the writer, as a police officer, that, although there may be cases of minor assault by a husband on a wife which are triable summarily, if the evidence of the wife is essential to the success of a prosecution in such cases, they might well be left alone.]

Sir,

In "Prosecuting Officer" at [1959] Crim.L.R. page 816, it is said that a wife is a competent and compellable witness for the prosecution when her husband is charged *on indictment* with inflicting personal injury on her. This is followed by the suggestion that she would not be competent or compellable in a summary trial. I should be interested to know the authority for this statement. I have consulted several of the shorter works on Evidence and they do not indicate any such qualification, nor does the judgment in *R.* v. *Lapworth* [1931] 1 K.B. 117.

Incidentally, the point whether a wife can be a competent witness for the Crown against her husband on a charge of dangerous driving when a child had been killed arose in *Parson* v. *Tomlin* (1956) 120 J.P. 129, but was apparently unperceived by anyone in the case, so the question whether she would have been competent, pursuant to section 15 of the Children and Young Persons Act, 1933, was not argued.

Yours truly,

"CAMBRIAN."

[Christopher Williams writes: As to the first point, perhaps I may refer to my reply to the correspondent from Lichfield, in which I do my best to set forth my views.

As to the most interesting further point, readers will no doubt recall that the case of *Parson* v. *Tomlin* (1956) 120 J.P. 129 was a case of dangerous driving, in which a child was killed. The wife of the accused was called by the prosecution. The defence objected, on the grounds of her incompetence as a witness against her husband. The objection was overruled, and her evidence was received. The husband was convicted, and then appealed, one of the grounds of appeal being the calling of his wife by the prosecution. The Divisional Court held that she was not competent. But, as your correspondent points out, there seems to be little doubt that, if the prosecution had liked to put it forward, they could have claimed competency on her behalf by reason of section 15 of the Children and Young Persons Act of 1933, and the First Schedule to that Act, in which may be found the following: "Any other offence involving bodily injury to a child or young person." The killing of the child would therefore have rendered the wife competent. It would not, however, necessarily have rendered her compellable, because, in *Leach* v. *Rex* [1912] A.C. 305, the House of Lords made it clear that where competency is conferred by statute on a witness who otherwise could not give evidence, competency does not necessarily involve compellability.]

Books and Periodicals

Book reviews:

The British Journal of Psychiatric Social Work. Vol. IV. 1958. No. 4. 5s. net.

This issue of the *Journal* is devoted entirely to the Report of the Royal Commission on the Law relating to Mental Illness and Mental Deficiency, 1954–57. The Mental Health Bill would substantially change the law on this subject on the lines laid down by the Royal Commission. The categories of persons affected by the new Bill will be considerably altered and the court will have powers conferred on it to deal with this enlarged group, if convicted of criminal offences. The readers interested in the criticisms, both administrative and technical, of workers in the field will find this issue of the *Journal* of value. Of particular interest in this connection are the two last articles Proposals concerning Mental Deficiency and the Royal Commission and the Psychopath. Persons interested in penology should not overlook the changes in terminology, taking into account advances in medical knowledge and in the organisation of social services, introduced by the Bill which may have a considerable influence on the nature of diminished responsibility and on the voluntary nature of a criminal act.

T. E. JAMES.

The Trial of Peter Manuel: The Man Who Talked Too Much. By John Gray Wilson. London: Secker and Warburg. 1959. 238 pp. (21s. net.)

The Manuel trial will remain one of the most remarkable in Scottish legal history. The accused faced charges of eight murders; he used a special defence of impeachment which had been obsolete for nearly a century; and halfway through the trial he summarily dismissed his counsel, a thing unheard of before in Scottish practice. The dramatic excitements of his trial have been splendidly captured in Sheriff Wilson's swift and accurate narrative. It is no mean feat to reduce the evidence of an eighteen-day trial, covering 700,000 words or about eight times the length of an average novel, into such a succinct and readable book, and that within ten months of the end of the trial.

What is of particular interest is the last chapter of the book, in which Sheriff Wilson raises a number of problems which were illuminated by the *Manuel* case. For instance, the author suggests the establishment of a central Scottish C.I.D., along the lines of Scotland Yard. At present local police forces usually conduct the investigation of major crimes, but may, if they wish, call in larger forces from Edinburgh or Glasgow; sometimes this is not done, for misguided reasons of local pride. Again, the Scottish detective training school only functions for four weeks in the year, and Sheriff Wilson questions whether this is enough.

The timely importance of this book is indicated by the fact that questions on these two points were raised in the House of Commons by two Scottish Members a few days after its publication.

N. G.

Books received:

Show Me a Lawyer. By Peter Bryan. London. Michael Joseph. 1960. 223 pp. 15s. net.

The Criminal Prosecution in England. By Sir Patrick Devlin. Oxford University Press. 1960. 118 pp. 15s. net.

Clinical Toxicology. By C. J. Polson and R. N. Tattersall. London: English Universities Press. 1960. 582 and (index) 7 pp. 42s. net.

Predicting Delinquency and Crime. By Sheldon and Eleanor Gluck. Harvard University Press; London: Oxford University Press. 1960. 273 and (index) 8 pp. 52s. net.

Stare Decisis. By Russell F. Moore. London: Mark Paterson & Co. 1960. 46 pp. 21s. net.

Readers' digest:

Evidence: Hearsay evidence: 229 *Law Times* 7.

Evidence: The Judges' Rules: 68 *Police Review* 22, 36.

Forensic medicine: Tests for intoxication and their application: 104 *Solicitors' Journal* 5.

Penology: After effects of punitive detention: 10 *British Journal of Delinquency* 178.

Police: Liability of the police constable in tort: 103 *Solicitors' Journal* 1013, 1036.

Police: Police and public—an inquiry: 123 *Justice of the Peace* 740; 124 *Justice of the Peace* 4.

Practice and procedure: Magistrates' Courts Act, 1957: 229 *Law Times* 21.

Practice and Procedure: Private prosecutions: 124 *Justice of the Peace* 63.

Road traffic: Parking: obstruction of highway: 228 *Law Times* 284.

Road traffic: Service of notice of intended prosecution: 124 *Justice of the Peace* 21.

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Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the Editor, *Criminal Law Review, 11 New Fetter Lane, E.C.4. Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

THE
CRIMINAL LAW
REVIEW

April 1960

Diminished responsibility

Yet one more criticism of the Homicide Act, 1957, has been voiced. In an address to the Institute of Criminology at Cambridge University Lady Wootton of Abinger described the defence of diminished responsibility in cases of homicide as an attempt to introduce into an essentially punitive system ideas and aims which were totally incompatible with such a system.[1]

She went on to say that the concept was simply an attempt to escape from the shackles of a penalty that was rigidly fixed by statute, a circumstance that applied to murder but not to manslaughter. There were very grave objections to this roundabout method of getting flexibility of treatment, among which was the impossible burden laid upon juries of answering questions which were not only beyond the competence of experts but were, by their very nature, unanswerable.

The Lord Chief Justice has criticised the Homicide Act on the grounds that it was a political compromise and a bad one.[2] In January this year we published an article which showed, by reference to the decided cases, some of the curious results of this compromise so far as the defence of diminished responsibility is concerned.[3] That it might lead to such results was pointed out in an earlier article.[4] The introduction of the doctrine of diminished responsibility was not recommended by the Royal Commission on Capital Punishment unless it could be applied to responsibility for all crimes, and then only after consideration by some specially appointed body.

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[1] See *The Times*, February 13, 1960.

[2] See [1959] Crim.L.R. 681.

[3] [1960] Crim.L.R. 6 *et seq.*

[4] [1957] Crim.L.R. 282.

It should be realised that matters relating to insanity are not matters which should properly be considered by a jury whose task it is to decide whether a particular person did a particular act which is a crime. These matters relate more properly to the court's consideration of the sentence which should follow a finding of guilt. A better solution might be provided by a reversion to the suggestion of the Royal Commission that matters relating to insanity and other mental disorders should be considered at that stage by a body specially appointed for that purpose.

Evidence before the Royal Commission on the police

At the first public hearing of the Royal Commission on the police, Sir Charles Cunningham, Permanent Under-Secretary to the Home Office said, in evidence, that the difficulties of the police in administering the law were increasing. The duty of the police was to enforce the law; the more legislation introduced the more the police had to know. He cited as examples of current problems dealing with motorists and the integration of coloured people into the community. He went on to say that he thought the standard of police recruits was good.

Later, Sir Charles said that he thought the wastage of policemen in their first ten years of service was due more to the hours of work and resulting difficulties of family life than to inadequate remuneration. He agreed with Sir Henry Willink, Q.C., the Chairman, that the overall deficiency of about 6 per cent. in strength was little different from what might be expected in a thriving force.

Another witness, Sir William Johnson, a Home Office Inspector of Constabulary, spoke of the low educational standard of recruits as shown by examination results. To offset this the system of promotion had been changed and the examination standard raised.

After-care

At a meeting of the New Bridge, an organisation to help discharged prisoners, the Home Secretary, Mr. Butler, said that he hoped before long to introduce legislation to implement the recommendations of the Advisory Council on the Treatment of Offenders by extending the scope of statutory after-care.

Corporal punishment

The Advisory Council on the Treatment of Offenders has been asked by the Home Secretary to consider whether there are grounds for reintroducing any form of corporal punishment as a judicial penalty in respect of any categories of offences and of offenders. The Council, whose Chairman is Mr. Justice Barry, is meeting shortly to consider this question. Anyone wishing to submit evidence should send it to the Secretary of the Council, at the Home Office, Whitehall, London, S.W.1.

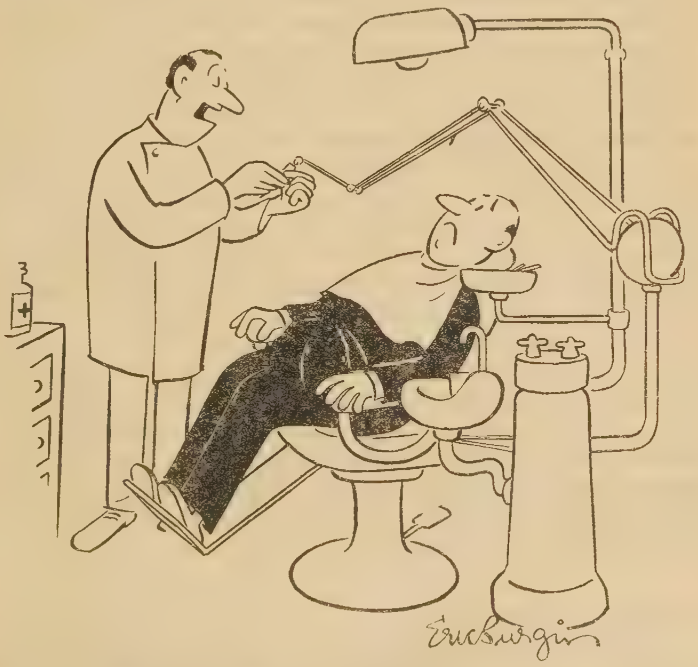
Criminal Law Revision Committee

The Home Secretary has appointed Mr. Justice Edmund Davies to be a member of the Criminal Law Revision Committee in place of Lord Justice Devlin.

Judicial appointments

Henry Gaunt Suddards, Esq., has been appointed Recorder of the Borough of Pontefract.

Geoffrey Arthur John Smallwood, Esq., has been appointed Stipendiary Magistrate for the Staffordshire Potteries.



"Well, well, Mr. Cartwright. We haven't met since you fined me and had my licence endorsed for that trifling motoring offence which . . ."

Industrial Disputes and the Criminal Law

By R. H. A. Eames

Faculty of Law, Queen's University, Belfast

The word " strike " has come to be accepted as almost a household term in our twentieth-century vocabulary, so numerous are the occasions upon which we find our modern national industries being confronted with trade disputes between managements and employees. So prevalent are these stoppages, with all the industrial strife, social and legal problems which inevitably accompany them, that it seems desirable that we should reconsider some of the legal points which may well confront us in this connection. Such a discussion as this obviously should include consideration of trade union law, but much has already been written on that topic in both legal and economic journals. In this article we shall concern ourselves more with the aspects of the problem which have reference to the criminal law, and particularly with the offence of criminal conspiracy. Although a discussion of how far combinations of employees to raise wages or improve conditions of work constituted criminal conspiracies at common law as being in restraint of trade or as designed to " molest, ignore, or impoverish an individual, or to prevent him from carrying on his business " may today only be of interest to the legal historian, it will be suggested that the various authorities not only lend themselves to useful discussion, but indicate several glaring deficiencies in our present law.

A true understanding of any legal system cannot be attained if prevailing political, social and economic thought is ignored, and this fact is perhaps nowhere more obvious than in criminal jurisprudence in general, and in the relation of criminal law to industrial problems in particular. It would appear desirable that we should consider first the historical development of the criminal conspiracy in connection with trade disputes if a discussion of the present position is to be of any value.

(1) Historical background

In earlier times the association of workmen in defence of their interests was deemed to be contrary to public policy; indeed, the same attitude was adopted towards the association of employers with such aims as the maintenance of prices. These early associations had little in common with the modern trade union, and because of their lack of numbers were easily covered by the ordinary common law of the land. The Industrial Revolution, with its creation of an urban working class, brought about the beginnings of the movement which has resulted in modern trade unionism. So rapid was the growth of these early combinations that by the end of the eighteenth century the common law of England was no longer competent to deal with the new organisation. The Combinations of Workmen Act, 1799,[1] was Parliament's first real attempt to meet the situation with a policy to prevent unlawful associations of workmen. Industrial unrest was rife and the realisation on the part of the individual worker that he was unable to bargain effectively with his employer did not help the situation. It was in this background of social unrest and change that the trade union movement, having some element of permanence, established itself despite the Combination Laws.[2]

The 1799 legislation remained in force for only twelve months, being repealed by the Combinations of Workmen Act, 1800,[3] which, (*inter alia*), made it an offence for any person to attend a meeting for the purpose of making any contract, covenant or agreement for obtaining an advance of wages, for alteration in or a lessening of working hours, for decreasing the quantity of work, for hindering or preventing others from employing whom they wished, or for controlling in any way another's control or management of his business. All such contracts were rendered illegal and void and it was made an offence to summon or by intimidation, to persuade or induce anyone to attend such a meeting.[4] The operation of this Act was, if anything, less effective than its predecessor. The Acts of 1799 and 1800 had been passed under the shadow of the French Revolution and the fear with which any combination was viewed which might attempt to invade the sphere of, or coerce, the established government, a fear which was prevalent in England at that time.

It was during this period that the idea of the " industrial conspiracy " was born. The first effect of the French Revolution had been to induce the impression that the English working class required to be disciplined, and it was to be many years before politicians, employers and indeed many of the developing middle class, were to be able to view any combining together of workers with anything but suspicion and fear.

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[1] 39 Geo. 3, c. 81.

[2] Citrine, *Trade Union Law* (1950) at 6.

[3] 39 & 40 Geo. 3, c. 106.

[4] The provisions of the Act clearly indicate the fear of any alliance between groups of workers or employers, which was prevalent in parliamentary circles at the beginning of the nineteenth century. It is equally clear, however, that Parliament realised that the problem could not be solved by the adoption of stern or oppressive policies. *Cf.* Mansfield Cooper, *Outlines of Industrial Law*, at 348.

As a result of the influence of the Benthamite reformers, a Select Committee on Artisans and Machinery in 1824 recommended that employers and workmen should be free to make such agreements as they thought fit, that the restrictions imposed upon this freedom by statute should be removed and that the law making combinations for such purposes criminal conspiracies should be altered. These recommendations found expression in the Combination Laws Repeal Act, 1824,[5] which substantially repealed all the earlier Combination Acts, including that of 1800. This Act expressly removed all criminal liability for conspiracy, whether under the common law or by legislation, for combining to alter wages, hours or conditions of work, to regulate the mode of carrying on any manufacture, trade or business or to induce persons to leave, refuse or return to work. However, this legislation in its turn was to be quickly replaced; as a result of a series of industrial stoppages involving rioting and violence, a stricter measure, the Combination Laws Repeal Act Amendment Act, 1825,[6] was passed.

This Act narrowly defined the combinations which were to be free from criminality, limiting them solely to the determination of the wages, prices and hours of work to be required by those combining. It has been suggested that by so doing the legislature assumed that all combinations to alter conditions of work were criminal conspiracies at common law as being in unlawful restraint of trade, and that they therefore remained criminal notwithstanding the repeal of the Combination Acts, except in so far as expressly declared to be lawful by the 1825 Act.[7] This view was clearly wrong and has been definitely disapproved of in *Mogul Steamship Co.* v. *McGregor Gow & Co.*[8] by Lords Halsbury, Watson, Bramwell, Morris, Field and Hannen, although in some of the earlier cases it found judicial support (*e.g.*, Crompton J. in *Hilton* v. *Eckersley*),[9] while in others it was held that such combinations might amount to conspiracies to injure.

The interpretations which were placed on the 1825 Act by the courts produced many unforeseen difficulties and in 1859, the Molestation of Workmen Act[10] was enacted to explain the 1825 Act as interpreted by the courts.

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[5] 5 Geo. 4, c. 95.

[6] 6 Geo. 4, c. 129.

[7] Citrine, p. 7. *Cf.* Hedges and Winterbottom, *Legal History of Trade Unionism*, at 39.

[8] [1892] A.C. at 39, 42, 46, 51, 57, 58.

[9] (1855) 6 E. & B. 47.

[10] 22 & 23 Vict. c. 34.

A good example of this in *R.* v. *Duffield* [11] where it was decided that whilst workmen not employed had the right, in combination, to agree that they would not accept employment except on specified terms, they had no right to combine to persuade others who were employed to leave that employment. Such an agreement would amount to conspiracy. The 1859 Act clarified and amended the legal position by providing that any person whether employed or not might enter into an agreement with others for purposes of fixing wage rates:

". . . no workman or any other person whether actually in employment or not shall . . . by reason purely of his endeavouring peaceably or in a reasonable manner and without threat or intimidation direct or indirect, to persuade others to cease or abstain from work in order to obtain the rate of wages or the altered hours of labour . . . be deemed or taken to be guilty of " molestation " or " obstruction " . . . and shall not therefore be subject or liable to any prosecution or indictment for conspiracy. . . ."

While this Act cleared up certain difficulties one limitation in its scope was obvious; workers were only protected if they could show that their disputes concerned questions of wages or hours of employment. Fortunately by the middle of the nineteenth century the Bench was showing very wide discretion and was becoming increasingly reluctant to find workmen guilty of conspiracy when they had combined in an effort to end grievances other than those relating to wages and hours.

Political pressure and continued industrial strife and controversy compelled the setting up in 1867 of a Royal Commission to inquire into the whole problem of the reform of the law as to trade unions, and as result of its recommendations the Trade Union Act, 1871,[12] was passed. Section 2 read:

" The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise."

One consequence of this section was that a strike could no longer be punished as a conspiracy in restraint of trade, yet only a year after the Act was passed the court in *R.* v. *Bunn* [13] held that a strike might nevertheless, under certain circumstances, be of such a nature as to amount to a conspiracy at common law to molest, injure or impoverish an individual, or to prevent him from carrying on his business.

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[11] (1851) 5 Cox C.C. 404.

[12] 34 & 35 Vict. c. 31.

[13] (1872) 12 Cox 316.

It would seem that this decision did as much as any other factor to bring about the Conspiracy and Protection of Property Act, 1875.[14] We will have cause to consider this enactment in greater detail later, and it is sufficient for the present to note that its chief effects on the part of our law at present under discussion were: (1) by removing the application of the doctrine of criminal conspiracy to Acts done "in contemplation or furtherance of a trade dispute" it reverses the decision in *R.* v. *Bunn*; such actions done in combination are no longer criminal unless the Act itself, when committed by one person, would be criminal,[15] and, (2) it repealed several earlier statutes under which breaches of contract of employment were criminal offences, but itself made such breaches criminal in two cases, *viz*., where the breach is by persons employed in the public supply of gas or water, and loss of that supply is likely to be the result,[16] and in any case where the breach is likely to involve serious injury to any person or property.[17]

The Conspiracy and Protection of Property Act, 1875, was amended in certain ways by Parliament in 1906. The intention of the legislature in enacting section 3 of the 1875 Act had been to exclude the law of conspiracy from all trade disputes, but the extension of the idea of conspiracy by the civil law and its emergence as a separate *tort*, and above all, by the development of the English common law, restricted the effect of that intention. The doctrine was put forward by the House of Lords in *Quinn* v. *Leathem*[18] where it was held that officers of a trade union were liable in damages for combining to injure a butcher by threatening to withdraw labour from one of his customers unless the customer ceased to deal with him. The jury had found that the defendant's motive was to injure the butcher, and not simply to defend their own legitimate interests, and it was held that although none of the officers had individually committed an unlawful act, the combining together to cause injury constituted an unlawful conspiracy and thus entitled the plaintiff to recover damages for the loss he had suffered. The House of Lords held that the 1875 Act gave no protection as it referred exclusively to criminal conspiracy.

The effect of this decision threw new light on the question of a conspiracy in trade matters,[19] and as the then Attorney-General,

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[14] 38 & 39 Vict. c. 86.

[15] 1875 Act, s. 3.

[16] 1875 Act, s. 4.

[17] 1875 Act, s. 5.

[18] [1901] A.C. 495.

[19] The decision had the effect of making one law for the individual and another for a combination of individuals. See Holdsworth, *History of English Law*, vol. 8, p. 397.

Sir John Walton said, "A scope has been given to the law of conspiracy so loose and so wide that it is impossible to indicate beforehand what may be the legal character of the conduct of these organisations." [20]

So it was that in the Trade Disputes Act, 1906,[21] the general policy was to reinstate the law as it had been taken to exist before 1875. It was an attempt to represent an alteration of the interpretation which the courts had placed on the law rather than an alteration of the law itself. So far as conspiracy was concerned, the risk of civil conspiracy was removed from all acts done in contemplation or furtherance of a trade dispute: if the act is not unlawful, a mere combining together to perfom that act will not make it so.

(2) Present position

The main substance of our present criminal law with regard to combinations in trade disputes is found in the Conspiracy and Protection of Property Act, 1875, as amended by the Trade Disputes Act, 1906, s. 3:

"An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime. . . .

"An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination would be actionable.

"Nothing in this section shall exempt from punishment any persons guilty of a conspiracy for which a punishment is awarded by any Act of Parliament.

"Nothing in this section shall affect the law relating to riot, unlawful assembly, breach of the peace, or sedition, or any offence against the State or the Sovereign.

"A crime for the purposes of this section means an offence punishable on indictment, or an offence which is punishable on summary conviction, and for the commission of which the offender is liable, under the statute making the offence punishable to be imprisoned either absolutely or at the discretion of the court as an alternative for some other punishment."

This section reversed the decision in *R.* v. *Bunn* (*ante*) by removing the application of the doctrine of criminal conspiracy to acts done in contemplation or furtherance of a trade dispute. Such an act done in combination was no longer to be criminal unless the act itself, when done by one person, would be a crime. To take an example of this: suppose X, Y and Z, workers at a factory, combine together to kidnap one of their employers in an attempt to force his fellow directors to accede to their demands for improved transport facilities to and from work. As they have conspired together to commit a criminal offence, they cannot claim any protection from the Act, and will be liable to a criminal prosecution. In fact, while the 1875 Act legalises strikes in the broadest possible terms, subject, of course, to the exceptions enumerated, it would perhaps be more accurate to say that the Act takes away the criminality of combinations in the cases to which it applies. It does not affect any civil remedies in respect of such trade combinations.

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[20] C. 7421, 1894, at p. 146.

[21] 6 Edw. 7, c. 47.

The words:

" . . . any act in contemplation or furtherance of a trade dispute . . ." have caused some comment. In *Conway* v. *Wade*[22] the plaintiff sued the defendant for damages for inducing his, the plaintiff's employers to dismiss him, by threats that unless they did so, the members of the same union employed at that factory would cease work. For the defence it was contended that the defendant's acts were not actionable as provided by section 3 of the Trade Disputes Act, 1906. The jury found as a matter of fact that there was no trade dispute existing or even contemplated by the men and that the defendant's threats were uttered in order to compel the plaintiff to pay a union fine and to punish him for not paying it and to prevent him from getting or retaining employment. The House of Lords held that there was sufficient evidence to justify such a finding. Their Lordships had to consider the precise meaning of this particular section, and part of the speech of Lord Loreburn L.C. is worth recording:

> " I think that (the words) mean that either a dispute is imminent and the act is done in expectation of and with a view to it, or that the dispute is already existing and the act is done in support of one side to it. In either case the act must be genuinely done as described, and the dispute must be a real thing imminent or existing. . . ."[23]

It would appear from this interpretation that where X and Y agree to combine together to perform some action in order to further their claims in an industrial controversy, the onus is on them to show that a trade dispute is about to take place or is in fact in operation, as a defence to a charge of conspiracy. While there may be some doubt as to the criterion to be used by a court in deciding the imminence, or lack of it, of a trade dispute, the draftsman has shed some light on the problem of " trade dispute." Section 5 (3) of the Trade Disputes Act, 1906, states:

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[22] [1909] A.C. 506.

[23] [1909] A.C. 506, at 510.

" The expression ' trade dispute ' means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the conditions of labour of any person."

The courts have decided that mere agitation or trivial bickering among the workers will not be sufficient. " If this section is to apply there must be a dispute, however the subject-matter of it be defined. A mere personal quarrel or a grumbling or an agitation will not suffice. It must be something fairly definite and of real substance." [24]

Should a person, or persons, not a party to any given dispute be covered by section 3? Suppose there is a dispute involving workers in a large motor-manufacturing plant on the question of introducing modern production methods. This may well be considered such an important question of principle that a complete strike at that plant is called for. Indeed the question of the methods involved may be of such prime importance that the strike may involve the entire motor industry. In such a situation should an individual workman, or body of workers, who wish to pursue their separate disputes with those in authority be permitted by the words of section 3 to carry out their task with impunity? In that case it would seem that a jury would be perfectly justified in finding that what he, or they, had done was done in contemplation or in furtherance, not of the actual trade dispute, but of his own designs and aims. Clearly, in such an instance as that the individuals concerned would not be covered by the Act, and should the nature of their acts warrant it, a criminal prosecution would lie.

It is submitted that the words of section 3 of the 1875 Act suggest the examination of the actual motives of the participants. In almost all the cases reported in which this section has been discussed this point appears to have escaped notice: only in *Conway* v. *Wade* was reference made to it, and there merely as obiter. Lord Loreburn L.C. said of section 3:

" . . . These words do, in my opinion, in some sense import motive." The question now arises as to what exact mental intention must be shown to warrant the exclusion of the protection afforded by the 1875 Act. It would appear that an intention to pursue an individual course of behaviour devoid of any intent to further the aims of the strike, under cover of which the action was taken would be sufficient for the court.

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[24] *Per* Lord Loreburn L.C., *ibid.* at 509.

This question of intent becomes even more noticeable when we consider the sections of the 1875 Act concerning breaches of contract. A strike may involve breaches of contract, although this does not necessarily follow; but for an individual to break a contract, he may be liable to damages in our civil courts, although not ordinarily becoming criminally liable. A strike which involves broken contracts does not for that reason alone become a criminal conspiracy. However in the public interest the legislature has made certain breaches of contract criminal. By section 4 of the same Act:

> " Where a person employed by a municipal authority or by any company or contractor upon whom is imposed by Act of Parliament the duty, or who have otherwise assumed the duty, of supplying any city, borough, town, or place, or any part thereof, with gas or water, wilfully and maliciously breaks a contract of service with that authority or company or contractor, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to deprive the inhabitants of that city, borough, town . . . wholly or to a great extent of their supply of gas or water, he shall on conviction thereof by a court of summary jurisdiction or on indictment . . . be liable either to pay a penalty not exceeding twenty pounds or to be imprisoned for a term not exceeding three months. . . ."

" . . . wilfully and maliciously " and " knowing or having reasonable cause to believe " leave little room for doubt, yet some uncertainty must still remain concerning section 3.

While apart from the exceptions already noted (and breaches of contract) a worker is free to withhold his labour if he so wishes, he is not allowed to coerce others into following his example. English law has always upheld the right to work, and this is just as important as the right to strike. However, there are many instances today of actions by employees which appear to border very closely on the well-established confines of prohibited coercion. By the 1875 legislation [25] it is an offence, subject to the penalty of a fine of £20 or imprisonment for not more than three months, wrongfully and without legal authority, with a view to compelling any other person to abstain from doing or to do any act which such other person has a legal right to do, or abstain from doing,

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[25] s. 7, 1875 Act.

(a) to use violence to or to intimidate such other person or his wife or children, or to injure his property,

(b) persistently to follow such other person about from place to place,

(c) to hide any tools, clothes or other property owned or used by such other person, or to deprive him of, or to hinder him in, the use thereof,

(d) to watch or beset the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place,

(e) to follow such other person with two or more other persons in a disorderly manner in or through any street or road.

It is impossible to expect the law to interfere with the influence which the opinions of workmen may have over their companions. However there are many instances today of the adoption of certain practices and methods by employees which although not covered by the law are just as effective as the physical violence or intimidation mentioned by statute. The knowledge that if one refuses to support one's companions in their attempts to cause a stoppage in work in order to bring attention to a particular grievance will result in being " sent to Coventry " will undoubtedly have a very great influence on one's attitude and future action. Such practices as this have already been reported as often prior to a strike as after it. It would seem that this type of action lies midway between what the law expressly prohibits and at the same time condones. Truly, actual physical interference is rare but it is suggested that there is a very strong case for a new attitude, if not by Parliament, then by our courts, towards such methods of influence.

Section 7 of the 1875 Act was substituted for the terms of the Criminal Law Amendment Act, 1871,[26] and in the earlier Act " intimidation " was limited to such intimidation as would justify a magistrate in binding over the intimidators to keep the peace; in other words, such attitudes as implied a threat of personal violence. According to the present state of our case law it is not intimidation merely to inform a worker that unless he acts in a certain way his workmates will strike,[27] even though the workman is in consequence made afraid that he will lose his position and be unable to get another at places where the particular union has influence.

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[26] 34 & 35 Vict. c. 32.

[27] *Cf. Gibson* v. *Lawson* [1891] 2 Q.B. 545. Matthew J., at p. 550, attempted to explain *Judge* v. *Bennett* (1877) 4 T.L.R. 75 (where it was held that any sort of threats calculated to make a person afraid amounts to intimidation),

In *Agnew* v. *Munro*,[28] a Scottish court held that actual fear on the part of the subject of the intimidation need not be proved in a case brought under the 1875 Act. It was the intention and character of the threats that were important. The form of intimidation required was an intention to raise alarm. It would seem that the courts require not alarm at the possibility of physical danger, but "the alarm of a good citizen that he or his family may suffer personal violence."

Such extremes as this are happily very rare today, but the fact remains that such practices as refusing to speak to a workmate, refusing to share the same table in a canteen, or refusing to work at the same machine or work-bench do occur in modern industry. It is suggested that if the term "intimidation" as used in the various statutes is to conform with modern conditions, a widening of the scope of its application is essential. Such an extension as was used some years ago by the Northern Ireland Parliament in the Trade Disputes and Trade Unions Act (Northern Ireland), 1927,[29] indicates the possibilities in this field:

"... 'to intimidate' means to cause in the mind of a person a reasonable apprehension of injury to him or to any member of his family or to any of his dependants or of violence or damage to any person or property, and the expression 'injury' includes injury to a person in respect of his business, occupation, employment or other source of income and includes any actionable wrong." [30]

The terms "injury to a person in respect of his business, occupation, employment. . . ." could be said to cover some of the practices mentioned (*ante*), yet it is suggested that this particular branch of our law is far from satisfactory.

While a combination of workers whose aim is to gain such objects as better working conditions and increased wages is now respected by our law there would appear from our discussion (limited in scope though it was), several points at which it lags behind modern development. It is essential that English criminal law should keep abreast of developments in our changing social conditions. It is submitted that only by continually relating the substance of law to the conditions found in our ever-changing society may we prevent it falling into "hatred, ridicule or contempt," and that while recognising the right to strike, certain elementary safeguards should always be maintained.

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on the ground that a threat to commit illegal watching and besetting might amount to intimidation. It is suggested that *Gibson* v. *Lawson* has overruled *Judge* v. *Bennett*, *cf.* Sophian, *Trade Union Law and Practice*, at 274.

[28] (1891) 28 Sc.L.R. 335.

[29] 17 & 18 Geo 5, c. 20.

[30] *Ibid.* s. 3 (2).

Prosecuting Officer

By Christopher Williams

Matters arising

"Well, sir," began Inspector Newman, as the Superintendent leaned back in his chair, and placed his finger tips together in a judicial manner. "Everything went all right at first. In fact, the girl really managed pretty well, until Pobjoy objected to her giving evidence about her complaint to P.C. Boots; she got a bit confused after that. Pobjoy said she wasn't allowed to tell the court what she'd said to Boots, because the accused man wasn't present when she said it."

"What did you have to say about that, then?" asked Portly.

"Nothing, sir," replied Newman. "As a matter of fact it rather put me out of my stride. At first I felt like agreeing with him, and before it occurred to me that could come in as a 'recent complaint,' the Chairman had agreed with Pobjoy, and it was too late."

"I'm not so sure about it being a recent complaint, you know, Newman," said Portly. "Still, tell me what happened first."

"Well," went on Newman, "it didn't really seem to matter very much, until the girl tried to say what she had told her friends on the swings. Pobjoy got going again, and said she couldn't tell the court what she'd said, because she'd been too far from the accused for what she said to be in his presence and hearing. I did my best to get her to say how far he actually was, but by then she was in a state, and all she would say was that he was 'quite a way away.' And the Bench again agreed with Pobjoy, so that was that."

"What did it matter, though?" asked Portly, with a puzzled look. "I mean, she could say what had happened in the shelter, and she identified the man."

"Well, sir," said Newman. "It's just that I felt it was an important bit of evidence against him that he got up and made off when he heard her tell her friends what he'd done. It showed he was guilty. But, of course, if he couldn't hear what she said, then his clearing out didn't mean so much."

"What did you do?" asked Portly.

"I had to let it go, sir," went on Newman. "I knew I would have a better chance with Boots and Brewer, who could give actual distances, and anyway would say they heard what she said, even from behind the accused, so the accused must have heard it. And that's what happened, even though Pobjoy had another shot at keeping it out. As a matter of fact, he protested at Brewer even mentioning that the girl had complained to Boots, because he'd not been there."

"Quite right too," interrupted Portly. "Obviously, even if it was a 'recent complaint,' Boots, not Brewer, was the man to give evidence of it."

"Well, anyway," went on Newman, "it didn't matter. As you say, Boots could give it. So I let it go. And when Pobjoy tried to stop Brewer saying what the girl told her friends, I was able to get the distances, positions and so on from Brewer, so that was all right. There we had the girl saying what the accused had done, the accused hearing this and making off, Brewer going after him and bringing him back, the girl identifying him and repeating her accusation, the accused giving his explanation in which he admitted going into the shelter to relieve himself, and then the arrest. And, of course, Boots covering much the same ground."

"Well, Newman," said Portly. "I can't see anything out of the ordinary in all this, you know. Just normal snags. What's bothering you about the case, eh?"

Recent complaint

"Two things, really, sir," replied Newman. "First of all, I'm not really happy about this recent complaint business. Pobjoy had another go about that with Boots. He said that, because the accused wasn't present, Boots couldn't give evidence of the complaint the girl had made to him. I said it was admissible as a 'recent complaint' in a sexual case, and therefore admissible, not, of course, to prove the truth of the complaint, nor to supply the corroboration necessary in practice in such cases, but to show consistency of conduct on her part. Pobjoy argued that her conduct had nothing to do with it, and that the doctrine of recent complaint wasn't applicable in a case like this. What's the true position, sir?"

"Quite honestly, Newman," replied Portly, "I've never been absolutely certain. Of course, you could have looked it up yourself, and made up your own mind. *Stone's*[1] says that statements made after transactions such as 'rape and other sexual offences' against females and young male persons are admissible—both the fact and the particulars of the complaint. *Archbold*,[2] on the other hand, says that recent complaints are admissible in cases of 'rape and other *kindred* offences.' So the question is, is indecent exposure a kindred offence to rape? I don't think it is, myself, and I think it's stretching things to have recent complaints in such cases. Other people think otherwise, and you do hear complaints being given in evidence, and not queried, in indecent exposure cases. But I don't see the point. After all, the basis for allowing them, as exceptions to the hearsay rule, is that they show consistency of conduct on the part of the victim, as you said yourself. In other words, if a man charged with indecently assaulting or raping a woman says that she was a willing partner, the fact that she complained to someone immediately after the assault would tend to show that her story in the witness box was consistent with her conduct at the time, and that she was not a willing partner. It would show that she hadn't changed her mind afterwards. I've read somewhere that the rule originated in the fact that a woman was not allowed to bring a charge of rape against a man unless she could prove that she had raised hue and cry immediately after the offence. If that is so, it would be quite a natural thing for the rule to extend in time to other offences, such as indecent assault, in which the consent or otherwise of the victim is relevant. And ultimately, as you know, to indecent assaults on young boys."

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[1] Stone's *Justices' Manual*, 91st ed., p. 339.

[2] Archbold, *Criminal Pleading and Practice*, 34th ed., para. 1077.

"But that's a point, sir," said Newman. "If a complaint is admissible to negative consent, why is it admissible in cases where consent doesn't enter into it anyway, offences against young girls, for instance?"

"I suppose because it would be silly to let them in when the victim was a grown woman, yet exclude them when she was a young girl. But I shouldn't waste too much time on it, Newman. In any event, I fail to see why you bothered about it in this case. After all, within minutes of the complaint you had the girl making the accusation in front of the man himself. The complaint couldn't have helped you in any way. Still, go on. What else is bothering you?"

Police notebooks

Newman went on to tell the Superintendent about Pobjoy's demand to see Brewer's pocket book. "I just didn't see why he should look at it, sir," he said. "Brewer'd never even got it out of his pocket."

"Now, Newman, that won't do at all, you know," said Portly, shaking his head solemnly. "That's not how you should go on. What on earth did it matter whether Pobjoy looked at the book or not? It only wanted Brewer to glance at it to check the time, or the date or something, for Pobjoy to have every right in the world to have a look at it. You were just making yourself unpleasant for nothing. There's such a thing as being right once too often, you know. By all means stick your toes in when there's something to gain. But you'll find yourself in quite enough trouble without looking for it like that, my boy."

Newman was silent for a moment, as he thought it over. Then he nodded ruefully. "I see what you mean, sir," he said. Then he brightened. "Anyway, the next thing was when Boots referred to Brewer's pocket book in giving his evidence, and said he'd talked the evidence over with Brewer. I thought Pobjoy was going to throw a fit. So I gave them a bit about *R.* v. *Bass*,[3] and what Mr. Justice Byrne had to say about collaboration, and something that Lord Justice Devlin says about sharing pocket books, in a book I've just read.[4] " And Newman related what had happened.

The Superintendent sat listening until Newman had finished. Then he heaved himself upright in his chair.

"You know, Newman," he said, "I can't congratulate you on all that. Apart from anything else, from what you've told me you must have looked as though you were on the defensive. I've told you before, if there's something that's likely to give the defence a bit of a lever, you'd much best get it out into the open when you're examining your witnesses. You'd already had due warning from Pobjoy that he was going to have a go at the pocket book—these tourist-class lawyers always do, you know, if they think they've the slightest chance of raising a dust. No, what you should have done was this. When Boots was in the box, you should have asked him what notes had been made, who made them, who was present when they were made, did he agree with them at the time, was he using them to refresh his memory, and so on. Since it would be obvious that he and Brewer had worked together on the notes, you could then get him to say that they'd discussed the evidence when the notes were being made. There you'd have had it all out, all open and above board, and Pobjoy would have had to make the best of it. Far better that way than letting Pobjoy drag it out in cross-examination, you know. See the point? "

A somewhat crestfallen Newman nodded. This wasn't his day, he mused.

"Right," said Portly. "Now then. What happened in the end? "

Corroboration

Newman went on to say how the case had folded up, with the accused man changing his plea.

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[3] (1953) 37 Cr.App.Rep. 59.

[4] *The Criminal Prosecution in England,* O.U.P., p. 42.

"How did Pobjoy take that, eh?" asked Portly.

"Never turned a hair, sir," replied Newman. "Jolly as a sandboy. Pulled my leg a bit, about there not being any corroboration . . ."

"No corroboration?" broke in Portly, glaring across the desk at the Inspector. "What d'you mean, no corroboration? Of course there was corroboration—not very strong, mind you, but good enough, I'm sure. The accused man's own explanation that he only went to the shelter to relieve himself was corroboration. You'll find I pointed it out in my process minute on the papers. What did he mean, eh?"

Newman gulped, and shuffled his papers. "Well, sir, I know, but the fact is that I'd forgotten to point it out in my opening, and Pobjoy'd spotted it, and was obviously waiting for me to finish so that he could make a speech to the court, telling them there was no corroboration."

"Who was Clerk?" asked Portly.

"The Deputy was sitting in then," replied Newman.

"H'm," murmured the Superintendent. "Pobjoy might have got away with it in that case; though he'd never get it past the old man himself. All the same, that should be a lesson to you, Newman. Not a bad rule to assume that it's always going to be the Deputy, when you're getting your papers ready for court."

"Well, anyway, sir," Newman went on, "I suppose I could have got on my feet after Pobjoy'd made that point, couldn't I?"

"Indeed you couldn't, Newman," replied Portly with energy. "Not normally, at any rate. The only time the prosecutor has a second chance to address the court is when the defendant has made a speech at the end of the case for the prosecution, then called evidence, and then got leave of the court to make a second speech; then you'd get a second chance, but otherwise, no. You must remember to make this sort of point in your opening. All you'd need to say would be that an offence of this nature requires corroboration, not by law, but by practice (assuming, of course, that the girl was going to take the oath), and that corroboration of the girl's allegation is afforded by the accused man's explanation about relieving himself. Something of that kind. Then, when the various witnesses come to give their evidence, the court will realise how the corroboration fits in. Got the idea?"

"Yes, sir," replied Newman.

Arrest

"By the way, was anything said about the accused being arrested?" asked Portly. "I mean, when Brewer said how he'd gone after him and brought him back to where the girl was?"

"Oh, yes," replied Newman. "I meant to mention that. Pobjoy made quite a thing about that—asked what power of arrest had been used, whether Brewer had witnessed the offence, and so on."

"What did you do about that?" asked Portly.

"Nothing, sir," replied Newman. "The Clerk had a word with the Chairman, and the Chairman told Pobjoy it had nothing to do with the court—if he wanted to take it up, then he'd better do it elsewhere."

"Well, they were right, of course," said Portly. "Pobjoy was, too, mind you. Brewer and Boots might have found it a job to prove they had power of arrest, you know. The fact that it's usually done that way with nothing said has nothing to do with it. In fact, I don't see how these pests can be kept out of harm's way without arrest of this kind. It's all right if we see them, of course, or if anyone else sees them and collars them and hands them over to us. I expect the best thing would be for some crank to have a go at us one day, and when he'd got a farthing's damages, we might get a power of arrest we could use. Still, that's not what I meant. What I had in mind was the point that the statement our friend made about only going in to relieve himself, was made after he'd been arrested, but before he'd been cautioned. Did Pobjoy say anything about the Judges' Rules?"

"I see what you mean, sir," said Newman. "No, he didn't. But surely he couldn't have raised that, could he? I mean, he hadn't been arrested, not properly, anyway. Boots and Brewer were still in the stage of suspecting him."

"Now, Newman," replied Portly, a pained look spreading over his kindly features. "You know better than that. When he ran off into the bushes, Brewer chased after him, didn't he? And brought him back, eh? What's that but arrest, I'd like to know? He wanted to go away, and Brewer wouldn't let him. Why, that's the very essence of arrest. My word, you'd have been mincemeat if you'd told old Pobjoy that his client hadn't been arrested when he made that statement. No, my boy, never try and fool yourself about whether a man's arrested or not. If he's been arrested, then he's *been* arrested, and you'd better make the best of it, not try and wriggle out of it. Nothing's more likely to put the court against you than that sort of thing. So why do it, when you've got a perfectly good answer right under your nose?"

"What's that, sir?" asked Newman dutifully.

"Why, rule 6, of course," replied Portly, spreading his hands in a gesture of display. "Rule 6, the one that says that a statement made by a prisoner before there is time to caution him is not rendered inadmissible merely by reason of no caution having been given, but that he should be cautioned as soon as possible. Fits like a glove, Newman."

"Yes, I can see it clearly enough now, sir, thank you," replied the Inspector.

"Is there anything else, then?" asked Portly, with a glance at the clock.

Bound over to quarter sessions

"There is just one thing, sir," Newman replied. "Nothing to do with this case, though. It's a dangerous driving case that I was the informant in. It was to have come on at quarter sessions next week, but now the defendant's written to ask for it to be put off to the next sessions."

"Well, what's wrong with that?" asked Portly.

"I'd been hoping to have some leave that week, sir, but I'm bound over to the sessions, so I suppose I shall have to change my leave."

"Oh, rubbish, Newman," broke in the Superintendent briskly. "Nothing of the kind. You don't have to be there. Get Inspector Broad to keep an eye on the case; he'll be there."

"But I'm bound over, sir," said Newman. "We always go to quarter sessions."

"Of course you do, Newman," replied Portly. "You go there to supervise your cases—see the witnesses are there, see how the police carry out their duties, see how probationers give their evidence, deal with any queries that arise, things of that kind. But you don't go there because you're bound over to attend, because you're not—you're bound over to prosecute the case; it's the witnesses who're bound over to attend. And you discharge your obligation to prosecute the case as soon as you pass the papers through me to the solicitor handling the case, and he briefs counsel. That's all you're bound over to do. In fact, you're not allowed to do more than that. You certainly can't address the court. No, my boy, you go to quarter sessions as a matter of police supervision, not because you're bound over. And if you've got something else on, then you get someone else to carry out your supervisory duties at sessions. So you have a word with Broad, he'll see you all right."

A Scottish Newsletter

Criminal statistics

Crime is on the increase in Scotland. Preliminary figures released from the Justiciary Office in Edinburgh, which is the department responsible for administering the business of the High Court of Justiciary, show that the year just ended was a record one in a number of respects. These records are, however, a matter for sorrow rather than celebration. Thus, more persons than ever before were indicted for trial in the High Court, where the major Scottish criminal cases are tried. The figure was slightly up on last year's total, which was almost *double* the 1957 figure. Edinburgh is much more law abiding than Glasgow, with its larger industrial and working class population ; there are about ten times as many major trials in Glasgow as in Edinburgh. It is said that Edinburgh's Saughton prison is a much more congenial establishment than grim, forbidding Barlinnie Jail on the outskirts of Glasgow, and it is not unknown for prisoners to take an appeal to the High Court solely in the hope of being transferred to the capital's jail.

1959 was also a record year for the number of cases remitted from the Sheriff Court to the High Court for sentence. The maximum penalty which the Sheriff may impose for a common law offence is two years' imprisonment, so when the Sheriff convicts the accused in a case where he thinks this sentence insufficient, he may remit the accused to a judge of the High Court. These judges seldom fail to take the broad hint thus given to them by the Sheriffs, and usually pass a heavier sentence.

Frivolous appeals

More criminal appeals were taken in 1959 than in any year previously. Appeals to the Criminal Appeal Court have increased at an alarming rate since the war. In 1940, eleven appeals were heard in one year, in 1950 there were seventy, and in 1959, there were 203 appeals. This great increase in the number of appeals has drawn disapproval from the Bench. Lord Justice General Clyde warned applicants that the Appeal Court might increase sentences against prisoners who submitted frivolous applications asking for leave to appeal. The applications were not to be made use of, said his Lordship, merely to secure a break in the monotony of a prison sentence. Force was given to these observations when, at the Autumn sittings of the court, two applicants had their sentences increased.

What is the reason for this great increase in the number of criminal appeals? It has been suggested that too much emphasis is laid on the rights of appeal when the convicted man first arrives in prison. The prisoner is repeatedly advised of his rights, and appeal forms are placed before him. Every care is taken so that he cannot later complain that he was ignorant of his rights of appeal. In such circumstances, it is often not surprising that the signing of an appeal application becomes in many cases automatic. Another reason suggested is that the increased number of appeals merely represents the greater volume of work passing through the courts. In 1945, charges were proved in all courts against some 80,000 persons. In 1958, this had increased to 141,250. What will happen when legal aid is introduced in criminal matters it is not easy to tell. It has been estimated, however, that if legal aid were freely available for criminal appeals, the number of appeals taken may increase on present figures by as much as 50 per cent.

Newspapers in contempt of court

One of the major sensations of the Winter circuit has been the *Scottish Daily Mail* case of contempt of court.[1] In November last this newspaper published a photograph of a man who was within hours of publication charged by the police with the murders of two people, and also an article which, it was claimed, would prejudice his fair trial. Counsel on behalf of the accused asked the court to interdict the newspaper from publishing any article in connection with the murders which might be prejudicial to the fair trial of the accused. Counsel for the newspaper tendered an apology for the publication of the photograph and article, and went on to point out the difficulties facing the Press. When publication was made, the accused had been neither arrested, nor charged, nor committed in respect of any crime—although this was to follow shortly—and there was no exact precedent for such a situation in Scots law. It was conceded, however, that the accused had been " detained," although as counsel said, lawyers often wondered exactly what this meant. The court held that the publication had been in contempt of court, and fined the publishers £5,000 and the editor £500.

In a long judgment the Lord Justice General outlined the duties of the Press in such matters. It was not proper, said his Lordship, for newspapers to conduct their own independent investigations of a case or to publish statements by witnesses, although the police might properly ask them to help by publishing a photograph. "All interrogation of possible witnesses must be done exclusively by the criminal authorities and the results must only be published to the world when the trial takes place. An independent interview of a possible witness by the Press while investigations by the Crown authorities are in progress constitutes an interference with the authorities' public duty and will usually impede their investigation. Similarly, in regard to photographs—if the authorities have not specifically asked for a photograph to be published in the Press, the Press must not procure or obtain the photograph of any person involved in the investigation and publish it, either during the investigations or during the trial itself."

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[1] See p. 265, *post.*

To obtain a proper understanding of the judgment it should perhaps be explained that the English system of preliminary hearing before examining magistrates has no place in Scots law. Lord Clyde referred to this and said that it was to the advantage of the Scottish system that there was no preliminary hearing, where the evidence could be exposed to the minds of persons who might later be called to serve on the jury in that particular case. In Scotland, the only preliminary hearing is the pleading diet, at which no evidence is led, but the accused merely indicates how he pleads.

Examining justices in England are not obliged to sit in open court [1a] but regularly do so. It is clear therefore that as long as the system of preliminary hearing in public continues to exist in English law, the practice of newspapers north and south of the Border will vary widely. In fact, on a strict reading of the law, no Scottish newspaper may now publish any statement by any person who has seen the perpetration of a crime, in case that person may be called at a later date as a witness in a criminal trial in connection therewith.

Tariff of penalties in motoring offences

In a debate in the House of Lords on motoring offences recently it was pointed out that despite the increased penalties provided in the Road Traffic Act, 1956, magistrates still persisted in passing sentences on motorists which were only a very small fraction of the maximum permissible penalty. In the case of *Sopwith and Others* v. *Cruickshank*,[2] a Scottish Sheriff imposed penalties on six motorists, brought before him on separate charges, which were considerably in excess of those normally imposed for the offences in question, and the motorists appealed to the High Court to have their sentences reduced. Before the Appeal Court may reduce a sentence, it must be satisfied that it is not merely excessive, but "harsh and oppressive" as defined by Lord Justice General Normand in *Stewart* v. *Cormack*.[3]

[1a] Magistrates' Courts Act, 1952, s. 4 (2).

[2] 1959 S.L.T. (Notes) 50.

Three of the appellants had been convicted of driving their cars while for one reason or another they did not hold a current licence, while the other three were convicted of failing to maintain mechanical parts of their cars in good and efficient working order. In addition to monetary penalties, all six motorists were disqualified from holding a licence for one year.

Dealing with the first case, a conviction in respect of faulty steering gear, the Lord Justice General said that the disqualification penalty was quite out of proportion to the offence. His Lordship compared penalties under other sections of the Road Traffic Act and pointed out that on conviction for careless driving (s. 12) the maximum disqualification period was one month, while for exceeding the speed limit (s. 10) no disqualification at all could be imposed until a third offence was established. In light of these provisions, said Lord Clyde, there was no justification for a twelve-month disqualification in the present case.

Perhaps the most important aspect of the case was the reminder given by the court that it is the duty of the magistrate in the exercise of his discretion to give individual consideration to each case brought before him. In each of the six cases heard by the Sheriff on the same day, although the offences had been different the same penalty was imposed without discrimination, and, as Lord Sorn observed, "what was done here as regards disqualification looks very like the mechanical application of a predetermined tariff." In the event, the Appeal Court reduced the disqualification on the motorists convicted of licensing offences to nil, and on the motorists convicted of driving vehicles with mechanical defects to one month. The court made it clear that it would not be proper to lay down any particular tariff for disqualification in respect of these offences.

Breach of the peace

A person may be charged in Scotland with breach of the peace where his conduct cannot be categorised under any other class of offence. It is not unexpected that in the fulness of time the scope and nature of this offence should be gradually enlarged, but the extension made in the case of *Young* v. *Heatly*[4] was rather startling, and has met with considerable criticism. As a result of this decision it may be that in certain circumstances a quiet conversation between two people in a private room amounts to a breach of the peace, even although there is no likelihood that anyone in the neighbourhood will be disturbed. This is a very long way from the traditional notion of breach of the peace as being a noisy disturbance in public which breaks the Queen's Peace.

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[3] 1941 J.C. 73.

[4] 1959 S.L.T. 250.

The idea that conduct *likely* to provoke a disturbance could be a breach of the peace was a later development.[5] Eventually, in the case of *Raffaelli* v. *Heatly* [6] a conviction was sustained where there was neither rowdiness, disturbance of the peace, nor actual alarm to any member of the public. In that case, which concerned a "peeping Tom," it was held that a breach of the peace could occur in circumstances where something was done in breach of public order or decorum which might reasonably be expected to lead to the lieges being alarmed or upset.

In the recent case of *Young* v. *Heatly*, the accused was a depute headmaster at a technical school. He was charged with committing a breach of the peace by conducting himself in a disorderly manner and making improper remarks to pupils in his school. Four separate incidents were libelled as having taken place on the same day in the master's private room, on each occasion only one pupil being present. The master was convicted and at the appeal it was argued that his conduct had not amounted to breach of the peace because the incidents took place in private, no one had been alarmed or annoyed, and there was no offence against public decorum, but the court sustained the conviction. It is obvious that this decision was a special one on the facts, and it does not establish a general rule that conduct in private can be a breach of the peace.

Habeas corpus and the 110 day rule

The writ of habeas corpus does not run in Scotland. But Scots law has always contained machinery to protect the freedom of the lieges by hastening trial and shortening the confinement of persons who cannot get bail. At one time the right to speedy trial was exclusively in the discretion of the court which could order a trial to take place on a fixed day, failing which the accused was given his freedom. By an Act of 1701, described as the "Scotch Habeas Corpus," a statutory timetable was provided to safeguard the freedom of suspected persons, and at the same time to give the prosecutor the necessary time to collect his evidence for the trial. This Act was amended by the Criminal Procedure (Scotland) Act of 1887, which forms the basis of the present law.

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[5] *e.g.*, in *Dougall* v. *Dykes* (1861) 4 Irvine 101, and *Ferguson* v. *Carnochan* (1889) 2 White 278.

[6] 1949 S.L.T. 284.

What is known as the 110 Day Rule was introduced by section 43 of the 1887 Act, which provides that where a person has been incarcerated for eighty days and an indictment is served upon him and he is thereafter detained in custody, then unless he is brought to trial and the trial concluded within 110 days of the date of his committal, then he shall forthwith be set at liberty and declared forever free of all question of process for the crime with which he is charged.

In the case of *Wallace* v. *H.M. Advocate* [7] an accused person had been committed on a charge of housebreaking and brought to trial 122 days after committal. During the currency of his committal warrant, however, he had been sentenced to two years' imprisonment in respect of other offences. The presiding judge at the second trial rejected the counsel's contention that the accused be set at liberty forthwith under section 43. The accused was convicted and sentenced but appealed to the High Court, where it was argued that the purpose of section 43, as the side note in the Statute Book indicated, was the prevention of delay in criminal trials, and its scope was not limited to cases concerning deprivation of liberty. The Appeal Court rejected this argument, holding that the prison sentence on the first charge superseded the committal warrant on the second charge, and that the 110 day rule therefore did not apply during the currency of the sentence. It is clear, however, that this decision could lead in certain cases to unjust results, for example, where a person served a long sentence knowing that a fresh trial on a second charge awaited him at some indefinite date after his release.

Preventive detention

Administrative difficulties continue to arise in cases where sentences of corrective training or preventive detention are passed. There is nothing to prevent a sentence of corrective training or preventive detention being imposed and made to run from the conclusion of a sentence of imprisonment, or made to supersede the sentence of imprisonment—*R.* v. *Cannell*.[8] But what happens in the reverse case, where the sentence of imprisonment is made to run from the end of the period of preventive detention? In the case of *Ramsay* v. *H. M. Advocate* [9] the High Court held that such a sentence of imprisonment may be competent, but that the appropriate procedure would have been to suspend the running of the sentence of preventive detention in order to allow the prison sentence to be served, at the end of which the sentence of preventive detention would be resumed. The difficulty is that if this latter course is not followed, the prisoner may be released on licence at the end of a period of preventive detention only to have to be brought back to serve the prison sentence.

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[7] 1959 S.L.T. 320.

[8] (1953) 37 Cr.App.R. 188.

[9] 1959 S.L.T. 324.

Time of the Troubles again ?

In one of the magistrates' courts in Edinburgh recently, an Irish labourer was admonished on a charge of breaking a local by-law by building a brick wall within the entrance passage of the tenement where he lived, in order to " keep the neighbours out " and secure a private entrance to his own door. " This seems to be carrying partition a bit too far," remarked the judge.

A SCOTS ADVOCATE,
Parliament House, Edinburgh.

A Concept of Crime

By P. J. Fitzgerald

In [1959] *Criminal Law Review* at pages 239 and 331 Mr. Hughes tried to defend a definition of crime put forward by Dr. Glanville Williams. This definition was proposed in (1955) 8 *Current Legal Problems* in an essay in which the author considered various attempts to define the concept of crime by reference to some intrinsic quality of the act, all of which intrinsic definitions he rejected together with the possibility of defining the concept of crime intrinsically at all, and concluded by propounding his own extrinsic definition of a crime as an act capable of being followed by criminal proceedings. Against criticisms of this sort of definition, that it is sterile and useless, Hughes attempts to defend it, with particular reference to American critics, by showing that the entrenched clauses in the constitution of the United States confront the American lawyer with practical problems of a kind that do not arise for his English counterpart. An American lawyer, for example, may have to decide whether certain border-line proceedings are criminal, so that the defendant is entitled to special protection under the constitution. Are the proceedings against an alien for deportation for instance under an act of Congress to be regarded as criminal proceedings? [1] The English lawyer's problem on the other hand is not so much how to classify a border-line type of procedure but rather to decide in a given case which of two different types of procedure must be selected.

The purpose of this article is to show that the feeling of dissatisfaction aroused by the formal or extrinsic type of definition put forward by Glanville Williams cannot be so easily allayed. Part of the reason for this dissatisfaction, it is suggested, arises from a failure to bring out the peculiar nature of the problem of defining the concept of crime. Although the notion of crime is a legal concept, it is not a concept generally used as a term in legal argument in the same way as such terms as "breaking," "night-time," and "dwelling-house" in the definition of burglary. It is important not to overlook this fact because lawyers are far more familiar with the problem of defining such practical concepts, and may not necessarily be aware that the purpose and method of defining a more abstract and less practical concept, such as the concept of crime, may not be the same.

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[1] *Wong Wing* v. *United States* (1896) 163 U.S. 228, 16 S.Ct. 977.

Practical concepts

Many of the ordinary words which we use are vague as regards the limits of their application. When for instance is a man middle-aged? How much hair does a man have to lose before we can call him bald? When does night end and morning begin? It is such words that lawyers may want to define and their reason for defining them is precisely to make clear the limits of their application, and the method employed is to prescribe artificially, either by legislation or by judicial decisions in border-line cases, how such words are to be used. For example, " night " is defined by section 46 of the Larcency Act, 1916, as the hours between 9.0 p.m. and 6.0 a.m. so that it may be clearly known whether the act of a prisoner in a given case may amount to burglary or house-breaking. A good example of definition by judicial decision in a border-line case is the case law on the meaning of the term " breaking." Breaking consists of some interference with the physical security of a building. Now while the paradigm case of breaking, *e.g.*, forcing open a locked door or window, is reasonably clear, there arise from time to time a number of cases which are difficult to classify with breaking or not breaking. Whereas forcing open a locked door is breaking, and coming through an already open door is not breaking (because here the householder has left a gap in the security of the house), what are we to say of the act of climbing down a chimney? On the one hand there is no interference with the physical security of the house here; on the other, this case is unlike going through an open door, because a chimney is a gap that cannot be closed. Now the ordinary speaker if asked whether this was breaking or not might fairly take the line of refusing to answer yes or no, because it is a border-line case that fits neither into the category of breaking nor into that of not breaking. The courts, however, cannot take this line and when *Brice's* [2] case came before the court in 1821 a definite answer was necessary so that the court could determine whether the accused was guilty or not of burglary. In deciding that climbing down a chimney did constitute breaking, the court was carrying out the process of developing the definition of the concept of breaking. What is noteworthy in these two examples of legal definition, the one of " night-time " by Parliament, the other of " breaking " by the courts, is that what is being done is not to *describe* how these words are used, or even how they are used by lawyers, but to *prescribe* how these words are to be used.

The word " crime," however, like some other general words, *e.g.*, law, is not a tool of legal argument in this sense. Lawyers do not need to define such words in order to reach conclusions, since the precise application of such words is rarely of practical importance.

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[2] (1821) R. & R. 450.

What then is the purpose of attempting to define the concept of crime? Clearly what is wanted is not some answer that will prescribe how the word " crime " is to be used but rather a description of how the word is used by lawyers. It is also important not to overlook that those who ask for a definition of crime are not necessarily all in search of the same sort of information. In the question what is a crime there seemed to be entangled three different though related questions.

Recognition of a crime

The question may be simply the request of the non-lawyer as to how he is to tell whether an act is a crime or not. Here we may give an imperative definition by saying that a crime is a breach of the criminal law. Though dismissed by Granville Williams as circular, such a definition is useful firstly in emphasising that a crime is not necessarily a moral wrong and vice versa. Secondly, its value is that it directs attention away from abstract speculation on the nature of the act and focuses it on the need to study the provisions of the criminal law itself. We can now continue by informing the non-lawyer where he can discover the provisions of the criminal law. Parallel to the layman's need for information is the lawyer's need to be able to decide certain difficult cases of practical importance where it is not clear at first sight whether the law has laid down that an act is a criminal offence or not. In *Cattel* v. *Ireson*,[3] for example, the defendant, who was being proceeded against under the Game Act, 1831, s. 23, wished to give evidence on his own behalf. This he could do by virtue of the Evidence Act, 1851, if the proceedings were civil, but not if they were criminal. The court therefore had to decide whether the proceedings in this case were criminal or civil, and in order to do this had to decide whether the Game Acts rendered the defendant's conduct a criminal offence. The court held that the statute had created a criminal offence and therefore the defendant could not give evidence on his own behalf. In *Brown* v. *All-Weather Mechanical Grouting Co., Ltd.*[4] the defendants were charged with aiding and abetting, counselling and procuring one Cassidy in the commission of a summary offence in contravention of the Vehicles Excise Act, 1949,

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[3] (1858) El.Bl. & El. 91.

[4] [1953] 1 All E.R. 474. See also *Sales-Matic, Ltd.* v. *Hinchcliffe* [1959] 1 W.L.R. 1005 where the Divisional Court held that section 21 of the Betting and Lotteries Act, 1934, which reads: " Subject to the provisions of this Part of this Act, all lotteries are unlawful," does not create any substantive offence but is merely a declaration that lotteries are unlawful.

s. 13 (2). The defendants argued that since Cassidy's conduct was not a criminal offence but only conduct rendering him liable to a penalty they could not be criminally liable for aiding and abetting. The Divisional Court held that the Act laid down that such conduct was not an offence punishable on summary conviction, but merely an act rendering one in Cassidy's position liable to an excise penalty recoverable on complaint before the justices, and consequently the defendants could not be convicted under the Summary Jurisdiction Act, 1848, s. 5, of aiding and abetting the commission by him of a summary offence. These two examples illustrate the unhelpfulness of a definition that would explain the meaning of crime by reference to its consequences for in these two cases it was impossible to know whether the consequences were civil or criminal proceedings until it was known whether the acts in question were criminal or not, and this primary question could only be answered by reference to the statutes in each case.

Effect of an act's being a crime

The request for a definition of crime may be the request of the non-lawyer to be told what it means for the law to lay down that certain conduct shall be criminal. In other words he may want to know the effect of the law providing that an act is a crime. Here lies the usefulness of the definition proposed by Glanville Williams which distinguishes criminal wrongs from other legal wrongs, *e.g.*, civil wrongs by pointing to the difference between criminal and civil procedure. For the non-lawyer it would be in general sufficient to describe the broad differences between the two forms of procedure, *e.g.*, the fact that in a civil trial the dispute is between two private individuals, whereas in a criminal trial it is between the Crown and the prisoner; that in a civil trial the defendant may set-off or counterclaim, and that the parties may compromise the suit, whereas criminal proceedings cannot be compromised without the consent of the Crown or one of its official representatives; that the rules of criminal procedure and evidence are stricter than those of civil procedure and evidence, and cannot be waived by the parties, *e.g.*, it is only in civil trials that the parties can agree to accept the majority verdict of a jury or that formal admissions are allowed; that in general the outcome of successful civil proceedings is an award of damages to the plaintiff, whereas the outcome of successful prosecution is the punishment of the accused; that appeals in civil and criminal decisions lie in certain cases to different courts; that in criminal cases the Crown has the right to pardon the accused and that in general there is no limitation of time in respect of criminal proceedings. Such a general description of the broad distinction between the two types of procedure would be sufficient to satisfy the non-lawyer who would not be worried unduly by the fact that the distinctions are not always clear cut.[5] A more detailed study, however, of this aspect of definition of crime would require an investigation of the difficult practical problems which have arisen from the fact that there is no right of appeal to the Court of Appeal in any criminal cause or matter. Though it is beyond the scope of this article to embark on a discussion of this problem, it is worth noting that here the court have been concerned with two different problems: (a) how far does the fact that the matter has arisen in connection with a criminal trial render it a criminal cause or matter? [6] and (b) the problem, similar to the problem in the United States, is a special tribunal, *e.g.*, a military court, exercising a criminal function or not? [7]

The common element in crimes

The quest for a definition of crime may be a more sophisticated question, of a lawyer reflecting on the criminal law, namely, what have all crimes in common other than the fact that they are breaches of the criminal law? In so far as the motive behind such a question is the desire for a simple test to decide whether conduct is criminal or not without reference to the provisions of the law, Glanville Williams' discussion is helpful and illuminating in demonstrating that this is a search for the unattainable. But what may lie behind the question " what is a crime? " may be the idea that Parliament and still more the courts have not created crimes arbitrarily or irrationally. Given that the aim of the criminal law is to announce that certain acts are not to be done, and to bring about that fewer of these acts are done, what is the principle or principles that have led the criminal law to prohibit the acts it has prohibited? Why for instance is it a crime to borrow a car without the owner's consent, but not a crime to borrow a bicycle without the owner's consent? Why is homosexual conduct between men criminal but between women not criminal? Why is it that in general the criminal law prohibits acts and not omissions? Such questions would lead to a valuable examination of crime in a social context, in which it would be necessary to look at not only criminal law itself but to consider for example what was said in debates and commissions which preceded the passing of criminal statutes,[8] and to examine what the courts have said in developing the criminal law and framing new crimes.[9] With regard to the courts it is important to remember that neither the imperative definition of crime as a breach of the criminal law nor the consequential definition of crime as an act capable of being followed by criminal proceedings tells us the whole story. Acceptance of either or both of these definitions by the judges of the nineteenth century would have prevented the incorporation into the common law of such crimes as attempts, incitements, conspiracies and public mischief, and it is important to remember that although the Court of Criminal Appeal has recognised that it is now the province of the legislature and not of the judiciary to create new criminal offences,[10] it remains in theory open to the court to create new crimes. Finally such an inquiry would be incomplete without reference to the general part of criminal law with its rules concerning the variation of liability. While it would be a mistake to suggest that these rules provide that a crime must contain some positive quality consisting in the absence of all possible offences of infancy, compulsion duress, etc.,[11] yet it remains true that we may often by looking at an act in its circumstances decide whether a crime has been committed by reference to these general offences even without considering the definition of a particular crime, *e.g.*, if the act was committed by a child under eight then there is no crime.

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[5] *e.g.*, by the fact that a *nolle prosequi* cannot be entered in summary proceedings.

[6] *e.g.*, is an order for restitution of property under s. 100 of the Larceny Act, 1861, an order in a criminal cause or matter? *R.* v. *Central Criminal Court*, 18 Q.B.D. 314.

[7] *e.g.*, *R.* v. *Army Council, ex p. Sandford* [1940] 2 All E.R. 372, where the question was whether the Army Council in considering whether to commute or mitigate the sentence passed by a court-martial was exercising a criminal function and giving a decision in a criminal cause or matter. See Allen, *Legal Duties*, pp. 230–232, for a discussion of this problem.

Moreover, such an investigation into the principles underlying the criminal law and an examination of why it is that those acts which are crimes are crimes is a necessary and valuable preliminary to the further and perhaps more important discussion as to whether the acts which are crimes ought to be crimes and whether certain acts which are not crimes ought to be criminal. While it may be confusing to conceal such questions under a general omnibus question "what is a crime?" such questions are important and worth answering and deserving a less cavalier treatment than they have been so far accorded.

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[8] Consideration of the Report of the Royal Commission on Capital Punishment and of the debates preceding the Homicide Act, 1957, might explain, if not justify, the classification of murders into capital and non-capital.

[9] *e.g.*, the remarks of Lord Kenyon C.J. and Lawrence J. in the well-known case of *R.* v. *Higgins* (1801) 2 East 5.

[10] *R.* v. *Newland* [1954] 1 Q.B. 158.

[11] This suggestion is based on a failure to realise that crime, like contract and many other legal concepts, is a defeasible concept. See Hart in (1949) 49 Proc.Arist.Soc. at 179–180.

Practice and Procedure

Queen's Bench Divisional Court

Applications for habeas corpus

The Divisional Court (Lord Parker C.J. and Donovan J.), dismissing applications for writs of habeas corpus by two prisoners detained in one of Her Majesty's prisons, made a statement about applications for habeas corpus by prisoners.

Per Lord Parker C.J.: "The Divisional Court has repeatedly stated that habeas corpus is not to be regarded as a means of appeal against conviction or sentence. A prisoner who wishes to challenge either his conviction or his sentence, should apply to the Court of Criminal Appeal or to quarter sessions, as the case may be.

If the prisoner nonetheless persists in his desire to apply for habeas corpus, the courses open to him are (a) to consult a solicitor about the possibility of instructing counsel to make an application on his behalf, or (b) to ask someone to make an application for him or arrange for one to be made, and in either case to swear the necessary affidavit, or (c) to apply to the local committee of the Law Society for legal aid for the purpose of making an application. There is no right of access to the Divisional Court otherwise than by the means described above.

As a concession, however, the court is prepared to consider any written statement by the prisoner setting out the grounds on which he considers that he is unlawfully detained and sent by letter to the Master of the Crown Office. This is not an application, since it is not in accordance with the Supreme Court Rules, but the Divisional Court (or in vacation the vacation judge) does as a matter of practice consider the letter and statement in order to see whether the prisoner has an arguable point. If he has, the court arranges for the Official Solicitor to instruct counsel to make a formal application under the rules on the prisoner's behalf.

If the court is of opinion that there is no arguable point, the prisoner is informed that the court sees no reason to depart from the formal procedure, leaving it to the prisoner to proceed in accordance with the Rules. Prisoners will not be permitted to make such an informal approach more than once. The Divisional Court has ruled that no applicant for a writ of habeas corpus can be heard in person unless some exceptional ground is shown for departure from the established practice: *cf. Re Greene* (1941) 57

T.L.R. 533. A prisoner therefore is not produced for the purpose of making an application in person unless the court so directs. See *The Times*, February 10, 1960. [D. C.]

Sentence

Sentence following trial by jury for summary offence

Section 25 (1) of the Magistrates' Courts Act, 1952, allows a person, aged 14 or more, accused of a summary offence punishable with imprisonment for more than three months to claim trial by jury. When a defendant takes advantage of this provision the offence (subsection 6) is deemed to be indictable as far as he his concerned.

R. v. *Bishop* [1959] 1 W.L.R. 931 ; [1959] Crim.L.R. 591 clearly shows that the court before which the defendant is convicted cannot pass a sentence of imprisonment greater than that which the justices could have imposed had they tried the defendant in a summary manner. The prosecution argued that if a defendant elects for trial by jury, the punishment is entirely at large. The court ruled: " It is said by Mr. Edwards, on behalf of the prosecution, that in effect this provision in paragraph 2 of the First Schedule is merely saying that if the trial is a summary trial the maximum sentence is six months whereas if he elects to be tried at sessions, the punishment is entirely at large. The court cannot accede to that argument. It seems plain that the provisions in the Schedule that a prisoner is liable on summary conviction to imprisonment for a term not exceeding six months means that he is so liable on conviction in proceedings initiated in a court of summary jurisdiction. Accordingly, the court feels that in the present case the maximum sentence was a sentence of six months."

It might be argued that this ruling means that in the circumstances the possible sentence is not enlarged and that, consequently, quarter sessions can pass no sentence which the justices could not pass and that it does not merely limit a sentence of imprisonment to the term within the powers of the summary court.

The difference between these two interpretations may be of great importance to a defendant, aged less than twenty-one, whose record renders him liable to a sentence of borstal training. For example: Where the justices have recently warned a prisoner that next time he comes before them he will be committed under section 28, and he is caught driving a motor-car while disqualified (Road Traffic Act, 1930, s. 7 (4)), he may well prefer to undergo the maximum term of imprisonment rather than risk a sentence of borstal training.

The question arises whether borstal training can be avoided by an election for trial by jury in reliance on *R.* v. *Bishop.* It is submitted that it cannot. Section 20, Criminal Justice Act, 1948, clearly states that " where a person is *convicted on indictment of an offence punishable with imprisonment* . . . the court may, in lieu of any other sentence, pass a sentence of borstal training " ; by his election the defendant will have put himself in a position falling within this section. [C. B. ORR.]

Case and Comment *

CONTEMPT OF COURT

Scots law—newspaper publication of photograph and article relating to party detained under suspicion of murder

Stirling v. Associated Newspapers Ltd. & Anor.

High Court of Justiciary: Lord Justice-General (Clyde), Lords Carmont and Russell.[1]

S. was detained by the police who were investigating two murders, and was subsequently charged. In the meantime the Scottish *Daily Mail* published a photograph and article containing details of interviews by a reporter with relations and friends of the suspect and of one of the victims.

Held, on a petition at the instance of the accused that the photograph and article constituted an interference with the administration of justice amounting to serious contempt of court which the court had the duty and power to punish. The newspaper publishers were fined £5,000 and the editor £500. [ALISTAIR R. BROWNLIE, S.S.C.]

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* Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For the petitioner: *A. A. McDonald* (instructed by Messrs. Bonar Hunter & Johnstone, W.S.). For the respondents: *Leslie Q.C., Forsyth* (instructed by Messrs. J. Gibson Kerr & Co., W.S.). For the Lord Advocate: *The Lord Advocate (Milligan Q.C.), R. S. Johnston Q.C., A.-D.* (Solicitor, Lionel I. Gordon, Crown Agent).

Commentary. The Supreme Criminal Court in Scotland has power to protect its own jurisdiction. It also has a paramount duty to secure an impartial trial: *Macalister* v. *Associated Newspapers Ltd,* 1954 S.L.T. 14; and a prisoner has the right to protection against what may prejudice the public mind and endanger fair trial: *Smith* v. *Ritchie & Co.* (1892) 20 R.(J.C.) 52. The present case extends this protection to a suspect, at any rate when subsequently arrested, charged and committed. The duty of investigating crime falls in Scotland on the Procurator Fiscal and is commonly exercised by the police under his supervision: *Smith* v. *H.M. Advocate,* 1952 J.C. 66. There is in Scotland no publication of evidence prior to the trial. The practice of holding a preliminary hearing in public in England was reviewed by the Tucker Committee: see [1958] Crim.L.R. 647. In *Stirling's* case the Lord Justice-General observed that "once a crime has been suspected and once the criminal authorities are investigating it they and they alone have the duty of carrying out that investigation." It appears that those who meddle do so at their own risk and are liable to punishment if they publish prejudicial matter.

The publication of the results of private investigations in England was held to be contempt justifying a fine of £1,000 in *R.* v. *Evening Standard* (1924) 40 T.L.R. 833; as was publication of a photograph calculated to prejudice identification in *R.* v. *Daily Mirror, ex p. Smith* [1927] 1 K.B. 845 though no punishment was there imposed. In *R.* v. *Payne* [1896] 1 Q.B. 577 it was observed that the power to punish for contempt was salutary but to be reserved for grave cases. See also *R.* v. *Parke* [1903] 2 K.B. 432; *R.* v. *Evening Standard Co.* [1954] Crim.L.R. 465 and *R.* v. *Bolam, ex p. Haigh,* 93 S.J. 220 where the editor of the *Daily Mirror* was imprisoned for three months and the proprietors fined £10,000. See also 1960 S.L.T. 5; [1960] Crim.L.R. 3.†

COURT OF CRIMINAL APPEAL

Venire de novo—discovery of statutory plea after plea of guilty resulting in conviction

R. v. Moye

Court of Criminal Appeal: Lord Parker C.J., Cassels and Ashworth JJ.: February 2, 1960.[2]

M. pleaded guilty at assizes to an offence of unlawful sexual intercourse with a girl of fourteen years of age. He appealed to the Court of Criminal Appeal against his conviction on the ground that, since the trial, he had discovered that he was under twenty-four years of age so that the statutory defence would have been open to him at the trial.

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† Commentary by reporter.

[2] For the appellant: *Marston Garsia* (instructed by Thompson & Co.). For the Crown: *Ling Mallison* (instructed by Herbert Simpson & Co., Leicester).

Held, dismissing the appeal, that although the appellant had not in fact produced sufficient evidence as to his age, this court would assume for the purpose of the case that he was under twenty-four years of age at the date of the trial. The question was whether this court had power to grant a *venire de novo*. Reference had been made to a number of cases but this court felt that they were all covered by the principles laid down in *R.* v. *Forde* [1923] 2 K.B. 400, where Avory J. said: "A plea of guilty having been recorded, this court can only entertain an appeal against conviction if it appears (i) that the appellant did not appreciate the nature of the charge or did not intend to admit he was guilty of it, or (ii) that upon the admitted facts he could not in law have been convicted of the offence charged." The appellant could not bring himself within these principles. The fact that he later discovered facts which would have enabled him to put forward a different plea did not enable this court to quash the conviction. [H. P.]

Commentary. The Court of Criminal Appeal may grant a *venire de novo* in cases where a plea of guilty has been possibly misunderstood; see *R.* v. *Hussey* (1917) 13 Cr.App.R. 121; *R.* v. *Baker* (1910) 7 Cr.App.R. 217, and see *Archbold,* § 973. As to the ambiguity in a plea of guilty, see cases cited in *Archbold,* § 425.

INDICTMENTS

Misjoinder of offenders and separate charges in same indictment—whether indictment may be amended

R. v. Smith and Others

York Assizes: Salmon J.: February 9, 1960.[3]

The first defendant was the father, and the second and third defendants the brothers of a girl with whom each was charged with incest. The acts of incest alleged against each were entirely separate one from another, and Melvyn alone was also charged with buggery with his sister, and Dennis Malcolm with offences against another girl. All three were charged in separate counts of the same indictment.

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[3] For the Crown: *R. H. Hutchinson* (instructed by the Director of Public Prosecutions). For Henry Smith: *J. B. Mortimer* (instructed by Payne & Payne, Hull): for Melvyn Smith: *A. W. Stephenson* (instructed by Myer Wolff, Hull); for Dennis Malcolm Smith: *J. S. Taylor* (instructed by Bird & Clarke, Hull).

Defence counsel moved to quash the indictment. There were no joint offences and the defendants had been wrongly joined on the same indictment. Counsel for the prosecution submitted that each count of the indictment was perfectly in order. He conceded that in the event of a plea of Not Guilty it might be difficult to try all three defendants together: in that event the proper course would be for the court to use its powers under Indictments Act, s. 5 (3), and order separate trials of the counts. Salmon J. observed that section 5 (3) was of assistance where one man was charged with a number of offences: it did not apply to a case where the defendants ought to have been charged in separate indictments. Counsel contended that the indictment was justified by rule 3 of the Indictments Rules, but if the court found against him on that issue, he would apply for leave to prefer separate indictments against each defendant. In reply, counsel referred to *Archbold*, § 231 and formally opposed any application for leave to prefer separate indictments.

Held, that the technical point taken on behalf of the defence succeeded. The indictment ought to be quashed. Leave was given for the preferment of separate indictments. [JOHN M. COLLINS, *Barrister-at-Law*.]

Commentary. A number of persons may not be indicted jointly for an offence which must be several; see *R.* v. *Weston* (1725) 1 Str. 623 and Archbold, § 231.

As to a judge's discretion to order separate trials of persons jointly indicted who plead not guilty, see Archbold, § 129.

LICENSING LAWS

Scots law—bona fide traveller—Licensing (Scotland) Act, 1903, s. 53

Forster v. Robinson

High Court of Justiciary: Lord Justice-General (Clyde), Lords Carmont and Russell.[4]

R., holder of an hotel licence, was acquitted of supplying liquor by his wife to O. on a Sunday when O. was neither a lodger nor a traveller. O. who was a local resident had recognised a friend's car and entered the hotel to ask a lift to a village some miles distant. R.'s wife overheard O. arranging for the lift and supplied him without further inquiry. An hour and a half later O. left in his friend's car but became unwell and returned home. There was no finding where O. had come from.

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[4] For the appellant: *Davidson* (instructed by Messrs. Cochrane & Blair Paterson, S.S.C., for Messrs. Ferguson & Forster, Stranraer). For the respondent: *I. MacDonald* (instructed by Messrs. Allan McDougall & Co., S.S.C., for Lawrence Dowdall, Solicitor, Glasgow).

Held, on the prosecutor's appeal against acquittal that O. was not a bona fide traveller and R. should have been convicted. Observed that a licensee should make reasonable inquiry where the customer has come from, when he arrived and where he is going; but failure to inquire will not result in conviction if the customer turns out to be a bona fide traveller. [ALISTAIR R. BROWNLIE, S.S.C.]

Commentary. The 1903 Act, now replaced by the Licensing (Scotland) Act, 1959 (see [1959] Crim.L.R. 799), prescribes no distance requirement for a bona fide traveller. To qualify a man requires more than a journey in prospect; he must have made a material beginning *Morrice* v. *Lyall*, 1934 J.C. 9. The purpose of the journey must be more than just to obtain drink: *Johnston* v. *Laing* (1876) 3 Couper 250. And when he has reached his destination a man is no longer a traveller: *Cairns* v. *Todd*, 1910 S.C.(J.) 17.*

SCOTS LAW

Contempt of court—newspaper publication of photograph and article relating to person detained on suspicion of murder

See STIRLING *v.* ASSOCIATED NEWSPAPERS, p. 265, *ante*.

Known thief—Burgh Police (Scotland) Act, 1892, s. 409—Criminal Justice (Scotland) Act, 1949, s. 9—probation orders resulting from previous thefts may be material indicative of known thief

Johnston v. Heatly

High Court of Justiciary: Lord Justice-General (Clyde), Lords Carmont and Russell.[5]

J. was charged that being a known thief in terms of section 409 of the 1892 Act as applied by a local by-law he loitered with intent to commit a theft. The evidence of loitering was not disputed nor that if he were a known thief conviction would follow. The material relied on by the magistrate in finding the accused a known thief consisted of three findings of guilt for theft by housebreaking for each of which a year's probation had been awarded followed at a space of six years by a conviction for theft resulting in a £3 fine. Argued on appeal against conviction that the purpose of probation was reformative and section 9 (1) and (2) of the 1949 Act prevented the use of probation orders as aggravations and *a fortiori* as providing material for a finding of known thief which carried a disability extending beyond the punishment for the particular offence.

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* Commentary by reporter.

[5] For the appellant: *Davidson* (instructed by Messrs. Cochrane & Blair Paterson, S.S.C.). For the respondent: *Cowie* (instructed by Town Clerk for the Burgh Prosecutor, Edinburgh).

Held, that probation orders though not available as aggravations were not to be disregarded and afforded ample material for the finding in question. [ALISTAIR R. BROWNLIE, S.S.C.]

Commentary. The Burgh Police (Scotland) Act, 1892, s. 409, provides in effect that a known thief may be convicted without proof of criminal intent. The term known thief is not defined, but at common law it was an aggravation of theft to show that the accused was by habit and repute a thief inferring an established course of evil doing—*Hume* 1, 2, 10; extending over at least a year and persisting to the date of trial—*Anderson* 182; a "brother of the trade"—*Alison* 1, 297. In *Moir* v. *Mitchell*, 1939 J.C. 81, Lord Justice-General Normand held that to justify a finding under the 1892 Act "there must be something in the nature of an established character as a man who commits thefts and not merely proof of a single act of petty theft occurring six years ago." The Criminal Justice (Scotland) Act, 1949, s. 9, provides that when satisfied that an offence has been committed the court may without proceeding to conviction make a probation order. Section 9 appears to restrict subsequent reference to such an order for the purpose of aggravation of an offence. It has been held in England that a conviction resulting in a probation order is not a conviction for the purpose of invoking corrective training under s. 21 (1) of the Criminal Justice Act, 1948: *R.* v. *Stobbart* [1951] 2 All E.R. 753; but that the effect of s. 12 of the Act (which corresponds to s. 9 of the Scottish Act) accords with the annotation furnished on page 35 of *Morrison & Hughes* on the Criminal Justice Act that "the section absolves the offender from legal consequences which otherwise would flow from a conviction": *R.* v. *Harris* [1951] 1 K.B. 107.

In the present case the probation orders were admitted to evidence a serious and established criminal character in the accused with consequent curtailment of his liberties. His record was open to scrutiny where he merely contemplated theft which would not have been the case had he actually perpetrated the crime.*

Licensing laws—bona fide traveller

See FORSTER *v.* ROBINSON, p. 268, *ante*.

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* Commentary by reporter.

ROAD TRAFFIC

Driving without due care and attention—standard to be applied

Taylor v. Rogers

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Cassels and Ashworth JJ.: *The Times*, January 30, 1960.[6]

Rogers was charged with and acquitted of driving a motor-vehicle without due care and attention, contrary to section 12 (1) of the Road Traffic Act, 1930. On an appeal by the prosecutor, by way of case stated, the justices found the following facts. Rogers was driving a heavy motor lorry along a main road at a time when the road was carrying heavy traffic. He was following an eight-wheel lorry through a village. On leaving the village the road curved to the left. There was a continuous white line round the curve, and the road was 22 feet wide. At this point the eight-wheel lorry flashed its rear lights, which Rogers understood to mean that it was safe to overtake. This he began to do. Whilst he was in the act of passing, a car came in the opposite direction. Rogers flashed his lights to indicate that he intended to complete the overtaking. The car, by mounting the verge, avoided a collision. The justices were of the opinion that since Rogers' action was deliberate and that since he had given his full attention to his driving, he could not be said to have been driving without due care and attention.

Held, allowing the appeal, that the sole question for the justices was this: Was the defendant exercising that degree of care and attention that a reasonable and prudent driver would exercise in the circumstances?

Per Lord Parker C.J.: "The test is objective; it matters not that the failure to exercise that degree of care was a deliberate act nor whether it arose from an error of judgment." [D. C.]

Commentary. The question whether a person was driving carelessly raises only a question of fact. If the defendant was not exercising that degree of care and attention that a reasonable and prudent driver would exercise in the circumstances he should be convicted. If the circumstances show that his conduct was not inconsistent with that of a reasonably prudent driver he should be acquitted. It is undesirable to complicate these cases by considering whether or not there had been an "error of judgment": *Simpson* v. *Peat* [1952] 2 Q.B. 24.

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[6] For the prosecutor: *Hiram Powell* (instructed by Sharpe, Pritchard & Co.). Rogers did not appear and was not represented.

SENTENCE

Committal to quarter sessions for sentence on breach of probation—procedure

R. v. Chapman & Pidgley

Court of Criminal Appeal: Lord Parker C.J., Cassels and Ashworth JJ.: February 2, 1960.[7]

C. and P., being on probation (imposed by quarter sessions), were adjudged by a magistrates' court to have been in breach of the probation order and were remanded to quarter sessions. At quarter sessions the original offences and the finding of the magistrates were put to C. and P. They admitted that the magistrates had so found but they were never asked whether they admitted the facts constituting the breach and, indeed, it was their case throughout that they had not been in breach of the probation order. Quarter sessions took the view that the finding of the magistrates was conclusive and treated the matter as, in effect, a committal for sentence. Each was sentenced to twelve months' imprisonment. On appeal to the Court of Criminal Appeal:

Held, allowing the appeals, that the question here was whether the procedure adopted by quarter sessions was right. The magistrates' court, by section 6 (3) of the Criminal Justice Act, 1948, could either fine a probationer for failing to comply with the probation order or could send him to quarter sessions to be dealt with. Subsection (4) of the same section provided that the magistrates' court should send to the court of quarter sessions a certificate signed by a justice of the peace, certifying that the probationer had failed to comply with such of the requirements of the probation order as might be specified in the certificate, together with such other particulars of the case as might be desirable; and a certificate purporting to be signed was to be admissible as evidence of the failure before the court of quarter sessions. The same subsection provided that where the probationer appeared before the court of quarter sessions and it was proved to the satisfaction of that court that he had failed to comply with any of the requirements of the probation order, that court might deal with him, for the offence in respect of which the probation order was made, in any manner in which the court could have dealt with him if he had just been convicted of that offence. In the judgment of this court the certificate of the magistrate was not conclusive but merely admissible evidence; and it was the court of quarter sessions which had to be satisfied that the requirements of the probation order had been broken. This was machinery in the nature of an appeal from the magistrates' findings, and quarter sessions could, therefore, hear further evidence and come to their own conclusion on the matter. The procedure to be followed was that laid down in *R.* v. *Devine* (1956) 40 Cr.App.R. 45; the breach alleged should be put to the probationer in the clearest possible terms and he should be asked to say whether he admitted it or not. If he did, the court could then proceed to deal with him. If he did not, then a trial would take place, albeit without a jury, and the court would have to pronounce whether or not it found the breach proved. It followed that in the present case there had been a mistrial. The proceedings at quarter sessions had been a nullity. It would have been open to this court to send the case back for retrial, but having regard to the fact that C. and P. had been in prison since October 27 last, the sentence would merely be quashed. Accordingly, C. and P. would be discharged. [H. P.]

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[7] For the appellant: *F. H. L. Petre* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Martin Tucker* (instructed by Messrs. Woodford & Ackroyd, Southampton).

TRIAL

Failure of judge to direct jury on question of burden of proof

McKenzie v. H.M. Advocate

High Court of Justiciary: Lord Justice-Clerk (Thomson), Lords Patrick and Mackintosh: January 16, 1959.[8]

McKenzie was charged with causing death by dangerous driving, contrary to section 8 (1) of the Road Traffic Act, 1956, and with driving whilst under the influence of drink, contrary to section 15 (1) of the Road Traffic Act, 1930. At the trial, the judge, in the course of his charge, omitted to direct the jury as to the onus of proof. On appeal against conviction,

Held, quashing the conviction under section 8 (1) of the Act of 1956, but applying the proviso to section 2 (1) of the Criminal Appeal (Scotland) Act, 1926, in respect of the conviction under section 15 of the Road Traffic Act, 1930, that the trial judge should have told the jury that the burden of proof which rests upon the prosecution in a criminal trial is to displace the presumption of innocence, and that the standard by which that burden falls to be discharged is the establishing of the guilt of the accused beyond reasonable doubt.

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[8] For McKenzie: *Stott Q.C.* and *McCluskey* (instructed by Frank J. McCluskey, for Jas. F. Reilly & Co., Glasgow). For the respondent: *The Lord Advocate* (*Milligan Q.C.*) and *Skae A.-D.* (instructed by Lionel I. Gordon, Crown Agent).

Per Lord Justice-Clerk (Thomson): " The emphasis and elaboration called for will depend on the circumstances of the case and on whether the evidence is narrow or overwhelming. The bare minimum is to say that it is for the Crown to prove the guilt of the accused beyond reasonable doubt." [D. C.]

Commentary. In English law a judge must, in summing up a case to the jury, deal with the question of burden of proof: *R.* v. *Rees* (1937) 21 Cr.App.R. 35; *R.* v. *Blackburn* (1955) 39 Cr.App.R. 84. And see further, *Archbold*, § 564.

Principles of Punishment

Sentences in the Court of Criminal Appeal

Prepared by HENRY PALMER, *Barrister-at-Law*

Imprisonment

In R. *v.* BURNETT the court (Lord Parker C.J., Donovan and Pearson JJ.: February 8, 1960) reduced sentences totalling sixteen months' imprisonment to a sentence which would permit immediate discharge. B. had pleaded guilty at a magistrates' court to stealing petrol and to the breach of a probation order. He was committed to quarter sessions where he was sentenced to twelve months' imprisonment for the larceny and to four months' imprisonment consecutive for the breach of probation. B., who was a young man of twenty-one years of age, had six previous convictions. The facts of the offence of larceny were that B., with another man, had taken a motor-cycle from a car park and had ridden it; and in the course of the ride one gallon of petrol was consumed. B. was dealt with by the magistrates' court for aiding and abetting the taking away of the motor-cycle and ancillary offences by sentences of imprisonment and disqualification. The court stated that B. had, in a sense, been sentenced twice for the same offence. He had been sentenced by the magistrates to two months' imprisonment in respect of the taking and driving away and then to twelve months' imprisonment by quarter sessions for the one gallon of petrol consumed in that process. Despite B.'s record this court felt that justice would be met if such a sentence of imprisonment were substituted as would enable B. to be discharged tomorrow.

Imprisonment

In R. *v.* O'CONNOR the court (Lord Parker C.J., Donovan and Hinchcliffe JJ.: February 22, 1960) reduced a sentence of imprisonment for life to one of five years' imprisonment. O. had been indicted at assizes for murder and his plea of guilty to manslaughter accepted. O., who was a young man of twenty-one years of age, was of previous good character. The facts were that O. had picked up a woman who was a spastic and, after visiting a number of public houses, apparently expected to have intercourse with her. When she refused, O. lost his temper and struck her with his fist; she fell, striking her head and fracturing her skull, and died in hospital some six days later. The court stated that the plea of guilty to manslaughter had not arisen out of provocation or diminished responsibility but had presumably been accepted on the basis that O. intended neither to murder nor to do grievous bodily harm. The trial judge had imposed imprisonment for life, as he himself said, out of mercy so that O. might be allowed out when the authorities thought fit. The judge had said: "You may develop, as your counsel has hoped, into a normal hard-working man, but it is for other authorities, not me, to determine when you will be allowed to mix with your fellow human beings." This court felt that this sentence was quite wrong in principle. There was here no question of mental disease or of anything requiring mental treatment. The case merited punishment for a definite number of years and not a sentence which would put the duty of deciding when to release the prisoner on other authorities. The appropriate sentence was five years' imprisonment and, accordingly, that sentence would be substituted for the sentence of imprisonment for life.

Imprisonment

In R. *v*. SUMMERTON the court (Lord Parker C.J., Donovan and Hinchcliffe JJ.: February 22, 1960) reduced a sentence of three years' imprisonment to one of two years' imprisonment. S. had pleaded guilty at quarter sessions to two offences of larceny of postal packets, and thirteen other offences were taken into consideration. S., who was a man of forty-one years of age, had no previous convictions. At the time of the offences S. had been employed as a postman and, during a period of nearly a year, had stolen letters from football pool promoters containing postal orders. The total amount involved was just under £40. The court stated that S. was previously of excellent character but, of course, a postman was in a position of trust so that stealing of postal packets by him was a very serious offence indeed. However, this court felt that they could make some reduction in the sentence because it had emerged on this appeal that S. had lost his pension of £2 10s. a week. In those circumstances, the sentence would be reduced to one of two years' imprisonment.

Imprisonment

In R. *v*. REID the court (Lord Parker C.J., Donovan and Hinchcliffe JJ.: February 23, 1960) reduced a sentence of five years' imprisonment to one of eighteen months' imprisonment. R. had pleaded guilty at a magistrates' court to two offences of obtaining money by false pretences (amounting to £1 14s.) and to one offence of obtaining credit by fraud (amounting to 10s.). R., who was a man of thirty-five years of age, had twenty previous convictions, all for offences of dishonesty, fraud and theft. The court stated that R. was eligible for preventive detention and, in passing sentence, the deputy chairman of quarter sessions had said that the time had very nearly come to impose such a sentence. But a sentence of five years' imprisonment had been imposed instead and that sentence was to be explained by reference to R.'s previous offences. It was wrong, as this court had said, to increase the sentence for a trivial offence by reference to offences in the past for which a man had already paid the penalty. If quarter sessions had thought that preventive detention was the appropriate sentence, then such a sentence should have been passed; if not, they should have passed a sentence commensurate with the gravity of the offence. Accordingly, this court would reduce the sentence of five years' imprisonment to one of eighteen months' imprisonment.

Borstal training

In R. *v.* HART the court (Lord Parker C.J., Donovan and Hinchcliffe JJ.: February 22, 1960) varied a sentence of borstal training to one of imprisonment for six months. H. had been convicted at a magistrates' court of an offence committed whilst on probation and sentenced to six months' imprisonment. Later he was sentenced by quarter sessions to borstal training in respect of the breach of probation. H., who was a young man of twenty years of age, had one conviction (larceny: 1958) other than those already referred to. The court stated that the only reason for interfering with the sentence of borstal training was that they felt that a sentence of borstal training following imprisonment was wrong in principle. Accordingly, a sentence of six months' imprisonment would be substituted for that sentence, the sentence to run consecutively to the sentence of imprisonment imposed by the magistrates' court.

Probation

In R. *v.* BENN the court (Lord Parker C.J., Donovan and Pearson JJ.: February 8, 1960) varied a sentence of borstal training to one of probation. B. had pleaded guilty at quarter sessions to three offences of breaking and entering and larceny; and seven other offences were taken into consideration. B., who was a young man of twenty years of age, had no previous convictions. The court stated that they had given leave to appeal in order to obtain reports from the probation officer and the prison governor. The probation officer had reported that this was a tragic case "of a normally decent law-abiding lad who, without really thinking, has indulged in a spate of crime." The prison governor said: "Benn has impressed me as a sincere youth who shows some proper regret and appreciation of his previous wrongdoing. . . . His progress to date has been very satisfactory and . . . Benn has been awarded his Training Grade as a mark of his satisfactory progress." This court thought that the sentence of borstal training, when imposed, was a perfectly proper sentence but, in the light of the period which had now intervened (he had been in custody five months) and of the reports, this court felt that it could properly substitute a probation order for three years.

Acts and Orders *

Animals

The Tuberculosis (Area Eradication) Order, 1950 (S.I. 1950, No. 2006), is further amended in respect of the movement of cattle into an Eradication or Attested Area under a licence granted under the Second Schedule to the Diseases of Animals Act, 1950, of cattle imported from Canada, the Channel Islands, the Isle of Man, Northern Ireland or Eire. The principal changes are (1) such an arrangement is no longer excepted from the provisions of Article 5 of the principal Order (which prohibits movement onto or off premises whose occupier has been served with a notice under the Article); (2) the condition relating to isolation of an animal moved to premises other than a slaughterhouse will in future apply so as to require it to be isolated from all other cattle (except those subject to the like condition) and not merely from cattle on the same premises; and (3) that condition will not apply at all if the animal is of attested status. Operative March 1, 1960. TUBERCULOSIS (AREA ERADICATION) AMENDMENT ORDER, 1960 (S.I. No. 87) (3d.).

For penalties for contraventions see section 7 of the Diseases of Animals Act, 1950.

The Movement of Animals (Records) Order, 1925 (S.R. & O. 1925, No. 1350), is revoked and re-enacted with amendments. The principal change is the requirement that records of movements of animals, so far as they relate to bovine animals, shall contain additional particulars, including particulars of the ear-marks required by the Tuberculosis (Area Eradication) Order, 1950 (S.I. 1950, No. 2006), or the Tuberculosis (Attested Herds) Scheme, 1958 (S.I. 1958, No. 1912). These records are now to be retained for three years instead of twelve months as hitherto. In respect of all other animals (sheep, goats and pigs) the twelve-month time limit remains unchanged. Operative March 1, 1960. MOVEMENT OF ANIMALS (RECORDS) ORDER, 1960 (S.I. No. 105 (4d.).

For penalties for contraventions see section 7 of the Diseases of Animals Act, 1950.

A large part of central and northern England is declared to be a Tuberculosis Eradication Area, and accordingly as from the operative date of the Order, March 1, 1960, the area specified in the Schedules to the Orders became subject to the provisions of the Tuberculosis (Area Eradication) Order, 1950 (S.I. 1950, No. 2006), as amended. These provisions include, *inter alia*, a prohibition against movement of cattle into such an area except under licence or on certain transit journeys. TUBERCULOSIS (CENTRAL ENGLAND ERADICATION AREA); (NORTHUMBERLAND AND EAST DURHAM ERADICATION AREA) ORDERS, 1960 (S.I. Nos. 255 and 256 (each 3d.).

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* Prepared by F. Maurice Drake, *Barrister-at-Law.*

For penalties for contraventions see section 7 of the Diseases of Animals Act, 1950.

Juries

Certain alterations have been made in the allowances payable under section 1 of the Juries Act, 1949, as amended by the Juries Act, 1954, to jurors in respect of jury service. The effect of the alterations is to increase the rates of day and night subsistence allowance. JURORS' ALLOWANCES REGULATIONS, 1960 (S.I. No. 233) (3d.); (SCOTLAND) AMENDMENT REGULATIONS, 1960 (S.I. No. 277) (3d.).

Legal Aid

Provision has been made as to the amounts payable under the Summary Jurisdiction (Appeals) Act, 1933, to a solicitor or counsel assigned under an appeal aid certificate in cases of appeals to quarter sessions, and as to the costs payable under the Costs in Criminal Cases Act, 1952, in cases of appeal to the Court of Criminal Appeal. Increases are provided for in the amount payable to a solicitor or counsel assigned under a defence certificate granted under section 1 of the Poor Prisoners' Defence Act, 1930, and provision is made as to the amounts payable out of the Legal Aid Fund to a solicitor or counsel assigned under a legal aid certificate granted by a magistrates' court under section 2 of the Poor Prisoners' Defence Act, 1930. All operative March 14, 1960. APPEAL AID CERTIFICATE RULES, 1960 (S.I. No. 258); CRIMINAL APPEAL (FEES AND EXPENSES) REGULATIONS, 1960 (S.I. No. 259); POOR PRISONERS' DEFENCE (DEFENCE CERTIFICATE) REGULATIONS, 1960 (S.I. No. 260); POOR PRISONERS' DEFENCE (LEGAL AID CERTIFICATE) REGULATIONS, 1960 (S.I. No. 261) (all 3d.).

London Traffic

The following Orders have been made detailing prescribed routes: S.I. Nos. 61 (Lambeth) (2d.); 62 and 143 (Southwark) (each 2d.); 73 (Holborn) (2d.); 74 (Kingston-upon-Thames) (2d.); 84 (Bermondsey) (3d.); 93 (Hendon) (2d.); 100 (Paddington and St. Marylebone) (2d.); 101 (Westminster) (2d.); 287 (Lambeth and Southwark) (2d.); 306 (Camberwell) (3d.); 307 (City of London) (3d.).

The following Orders have been made prohibiting cycling on footpaths: S.I. Nos. 64 (Caterham) (2d.); 75 (Staines) (2d.); 85 (Shoreham, Sutton-at-Hone and Westerham, Kent) (3d.); and 94 (Heston and Isleworth) (3d.).

The following Order has been made prohibiting waiting: S.I. No. 86 (Riverhead) (3d.).

The following Order has been made imposing a weight restriction on certain routes: S.I. No. 65 (Roydon) (3d.).

The following Order has been made restricting waiting and loading during specified hours: S.I. No. 276 (St. Marylebone) (3d.).

The following Order has been made restricting the driving of motor-vehicles on certain roads: S.I. No. 76 (Hatfield) (3d.).

The London Traffic (Parking Places) Consolidation Regulations, 1957 (S.I. 1957, No. 1937), are further amended. The principal changes are (1) the appointment of certain parking places in Westminster, East Ham, Gravesend and Hornchurch are revoked; (2) the limits of certain parking places in Wealdstone, Richmond, Slough, Sutton, Walthamstow, Chertsey, Sevenoaks and Grays, are altered; (3) the permitted times during which vehicles may wait in certain parking places in Hoddesdon are extended; and (4) new parking places are appointed in certain streets in Westminster, Greenwich, Acton, Gravesend, Leyton, Chertsey, Orpington and Sevenoaks. Operative January 30, 1960. LONDON TRAFFIC (PARKING PLACES) CONSOLIDATION (AMENDMENT) REGULATIONS, 1960 (S.I. No. 63) (3d.).

Magistrates

Alterations have been made in the lodging allowances payable to justices of the peace in respect of expenditure necessarily incurred by them on accommodation for the purposes of their duty as justices. The effect of the alterations is to increase the maximum allowances payable for this purpose. In the case of justices of the peace in England and Wales an alteration is also made in respect of sleeping accommodation in a train, the fixed rate provided for by the existing Regulations being replaced by the actual charge of the sleeping accommodation with 5s. added. Operative February 15, 1960. JUSTICES' ALLOWANCES REGULATIONS, 1960 (S.I. No. 144)

(3d.); JUSTICES' ALLOWANCES (SCOTLAND) AMENDMENT REGULATIONS, 1960 (S.I. No. 219) (2d.).

Pests

The restrictions imposed by the Importation of Plants Order, 1955 (S.I. No. 81) (Scotland) Order, 1955 (S.I. No. 405), on the importation of certain raw vegetables from specified districts of Belgium, France, Italy and the Netherlands, are modified for specified periods of 1960. IMPORTATION OF RAW VEGETABLES ORDER, 1960 (S.I. No. 184); (SCOTLAND) ORDER, 1960 (S.I. No. 214) (each 3d.).

Probation

Alterations are made in the lodging allowances payable to members of probation committees or case committees constituted under the Criminal Justice Act, 1948, or of committees constituted for the metropolitan stipendiary court area under paragraph 7 of the Fifth Schedule to that Act in respect of expenditure necessarily incurred by such members on accommodation. In the case of sleeping accommodation in a train, for the fixed rate provided for in the existing rules is substituted the actual fare plus 5s.; in the case of other accommodation the allowance is raised from 37s. 6d. to 52s. 6d. in London and from 30s. to 42s. elsewhere. Operative February 15, 1960. PROBATION (ALLOWANCES) RULES, 1960 (S.I. No. 169).

Revenue

The lists of banks and other persons authorised to deal in gold and foreign currency, and the list of authorised depositaries with whom certain securities are required to be deposited, under the provisions of the Exchange Control Act, 1941, are further amended. Operative February 12, 1960. EXCHANGE CONTROL (AUTHORISED DEALERS) (AUTHORISED DEPOSITARIES) (AMENDMENT) ORDERS, 1960 (S.I. Nos. 191 and 192) (each 2d.).

For penalties for contraventions see Schedule 5 to the Exchange Control Act, 1947.

Road Traffic

The Motor Vehicles (Authorisation of Special Types) General Order, 1955, is further amended by providing (a) that in relation to movable plant or equipment which is specially designed and constructed for moving excavated material, and the use of which is authorised under Article 12 of the principal Order, the condition that the maximum overall width of a vehicle is not to exceed 11 ft. shall cease to apply (Article 2 (1)); (b) that the use on roads of motor-vehicles and trailers or types of motor-vehicles and trailers constructed for use outside the United Kingdom, of new or improved types of motor-vehicles and trailers constructed for tests or trials, and of motor-vehicles and trailers equipped with new or improved equipment or types of equipment, is authorised subject to specified conditions (Article 2 (2)); (c) for a revised Schedule to be substituted for the First Schedule to the principal Order, the changes being mainly those arising out of the creation of the Ministry of Aviation and the consequent re-allocation of functions between certain government departments (Article 2 (3) and Schedule). Operative February 11, 1960. MOTOR VEHICLES (AUTHORISATION OF SPECIAL TYPES) (AMENDMENT) ORDER, 1960 (S.I. No. 167) (4d.).

For penalties for contraventions see sections 111 (3) and 113 of the Road Traffic Act, 1930.

Provision is made for the authorisation of the holding of races or speed trials between bicycles or tricycles, not being motor-vehicles, on public highways in England and Wales and in Scotland. A distinction is made between a race or speed trial being a " time-trial " (as defined by reg. 2 (1)) and any other kind of race or trial (described by reg. 2 (1) as a " bicycle race "), and it is provided (1) that the holding of a time-trial is authorised if notice of the proposal to hold the trial, containing particulars about it, is given to the police (reg. 3 (1)); (2) that the holding of a bicycle race is authorised if it is held and conducted in accordance with the conditions specified in regulation 5 (1) (*a*) and the like notice as aforesaid concerning the race is given to the police (reg. 5 (1)); (3) that in the case of a time-trial or bicycle race of which the required notice has not been given or where the necessary particulars about it have not been given, or where changes are proposed in matters affecting the trial or race which affect the particulars already given, the police, if given notice of the particulars or changes, as the case may be, may authorise the race to be held (regs. 4 (1) and 6 (1)); (4) that in the case of a bicycle race which is not a race proposed to be held and conducted in accordance with the conditions specified in regulation 5 (1) (*a*), the police may, if application is made to them and the like particulars as aforesaid with respect to the race are given to them, authorise the race to be held (reg. 7 (1)); (5) that in the case of any bicycle race, the police may impose conditions subject to which it may be held and conducted (reg. 8). Both operative March 1, 1960. CYCLE RACING ON

HIGHWAYS REGULATIONS, 1960 (S.I. No. 250) (4d.); (SCOTLAND) REGULATIONS, 1960 (S.I. No. 270) (4d.).

For penalties for contraventions see section 13 of the Road Traffic Act, 1956.

Scotland

See under Juries, Magistrates, Road Traffic, and Pests, above.

Witnesses

Increases are made in the allowances payable under the Costs in Criminal Cases Act, 1952, to persons attending to give evidence in those criminal cases to which the Act applies. Operative March 1, 1960. WITNESSES' ALLOWANCES REGULATIONS, 1960 (S.I. No. 228) (3d.).

Practical Problems

All questions for consideration should be addressed to " The Editor, The Criminal Law Review, 11 New Fetter Lane, London, E.C.4." The questions of readers only are answerable in the Review. All questions should be submitted in triplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

67. *Sections 12 (1) and 21 of the Road Traffic Act, 1930—necessity for warning of intended prosecution for offence of driving without reasonable consideration for other persons using the road*

Section 12 (1) of the Road Traffic Act, 1930, creates two offences, namely, driving a motor-vehicle without due care and attention and driving without reasonable consideration for other persons using the road, and section 21 of that Act enumerates offences, including one of " careless driving " for which a person must be warned that the question of prosecution will be considered.

The Act does not define " careless driving " and the question that has arisen is this: does the offence of careless driving for which warning of intended prosecution is required include both the offences created by section 12 (1) of driving without due care and attention and driving without reasonable consideration for other persons using the road, or only that of driving without due care and attention?

In order to constitute the offence of driving without reasonable consideration for other road users it would appear that there is no necessity to prove lack of care on the part of a driver and, in fact, a person could commit an offence while driving with extreme care by deliberately travelling at a fast speed through a pool of muddy water, causing it to splash over pedestrians in the vicinity. In contrast, an offence of " careless driving " would appear to suggest a lack of care.

Your opinion would be valued on the material point as to whether a warning of intended prosecution under section 21 of the Road Traffic Act, 1930, is necessary in the case of an offence of driving without reasonable consideration for other road users, and therefore whether such an offence will constitute " careless driving."

[W. D.]

ANSWER

In my opinion a warning of intended prosecution under section 21 of the Road Traffic Act, 1930, is necessary in the case of the two distinct offences dealt with by section 12 of that Act, *viz.* (1) driving without due care and attention, and (2) driving without reasonable consideration for other persons using the road.

It is certainly the practice of magistrates' courts to accept that the warning under section 21 is necessary in the case of the two distinct offences; but I know of no case which has been appealed against so that there is no reported decision of a higher court and it is, of course, possible that the practice of the magistrates' courts is wrong. But for the following reason I do not think it is wrong.

As you rightly say, "careless driving," which is referred to in section 21, is nowhere defined in the Act; and in my view the term covers cases of driving without due care and attention and driving without reasonable consideration for other persons using the highway.

I appreciate the force of the remarks made in the third paragraph of your question and, indeed, personally I would have thought this argument should prevail. However, as recently as January 29, 1960, the Divisional Court took a different view—see *Taylor* v. *Rogers* (*The Times*, January 30, 1960). In that case the court reversed the decision of the justices and held that a deliberate and wilful act of bad driving could constitute "careless driving"—the test of careless driving being the objective one of whether or not it measured up to the standard expected of a reasonable ordinary driver and *not* the subjective test of what was going on in the defendant's mind. It would seem that this decision has gone a long way towards removing the distinction between the two offences created by section 12 of the Road Traffic Act, 1930.

Furthermore, the marginal note to section 12 reads "careless driving." It is true that on accepted principles of interpretation of statutes the marginal notes should have little or no weight; but in practice they are often referred to (see, *e.g.*, *per* Goddard L.C.J. in *Miller* v. *Battersea B.C.* [1955] 3 All E.R. 279, at 281).

Therefore, although the point would seem open to argument it is my opinion that the warning under section 21 is required in both cases. [M. D.]

Books and Periodicals

Forensic Medicine: Observation and Interpretation. By A. Keith Mant. London: Lloyd Luke. 1959. 42s. net.

The appearance of a book devoted exclusively to observation and interpretation in forensic medicine is to be welcomed, although one could have hoped for a more attractive price. The greater part of the book is concerned with the preliminary investigation of sudden and violent deaths and the remainder deals with medico-legal aspects of sexual offences. There can be no doubt that the book will be of considerable use to general practitioners, police surgeons, coroners' officers, and C.I.D. personnel concerned with the examination of such cases. Dr. Mant's chief message, the dangers of inadequate investigation of the victim, is convincingly put and supported by many examples. The book is profusely illustrated, but one must protest against the omission of the conventional practice in medical textbooks of masking the facial features in photographs. Furthermore, there can be no excuse for identifying photographs of victims with named cases, some of which attracted considerable publicity at the time.

J. D. J. H.

Suicide in Hong Kong. By P. M. Yap. Hong Kong University Press; London: Oxford University Press. 1959. 12s. 6d. net.

Dr. Yap's slim volume is packed with information relating to suicide and attempted suicide in Hong Kong during the period June 1953 to December 1954. He has made a skilful statistical analysis of his data and has studied intensively the sociological and psychological factors involved. He has produced clear confirmation of the epidemiology of suicide as elucidated by others in very different millieus. Well authenticated findings again appear. The curves for age and sex are similar to the Western patterns, but the author points out significant differences. These are especially related to variation from the traditional Chinese social pattern as well as to disintegrating factors at times common.

The well-known May/June peak is found, and also the higher incidence in urban areas. Dr. Yap makes a fascinating study of the sociological factors involved in the area concerned. He shows the effect of the marginal Chinese culture pattern and the immense problem brought into being by large-scale immigration. It is extremely interesting that Dr. Yap found insanity relatively low in the table of cause, whilst those concerned with refugee and similar problems will find much concern in the high rating of stress combined with somatic illness.

To your reviewer the greatest value is this admirable monograph in the author's study of attempted suicide, particularly his contribution to the concept of hypereridism. This has implications that extend widely through the field, not only of personal distress, but also through human relations at all levels.

ARTHUR GRAHAM, M.A., M.D., D.P.M.

Consultant Psychiatrist.

Advocacy at Petty Sessions, 2nd ed. By B. Fraser Harrison. London: Sweet and Maxwell, Ltd. xi, 117 and (index) 4 pp. 15s. net.

That a second edition of this most useful book has been called for demonstrates its value to the barristers, solicitors, and police officers and ministry officials for whom it is written. Mr. Fraser Harrison points out in his preface that " nine out of ten matters which come to trial are resolved in the petty sessional courts," and he emphasises that advocates have grave responsibilities when they appear in those courts; responsibilities not only to the client, but also because, as he observes, " many, if not most laymen judge all our courts of law and the legal profession generally by the quality of justice meted out by the magistrates and the behaviour and ability of the advocates who plead before them." This point about the behaviour and ability of the advocates has notable importance, but sometimes it seems to be overlooked or neglected by high dignitaries both at the bar and among the solicitors. Fortunately for the profession and the public, sneers about " a police court practice " are now less frequent than in the past, and it is beginning to be realised that the " police court " advocate must be well equipped for his difficult and responsible duties, and that his ability, character and behaviour are frequently the standards for judging the whole profession. Mr. Fraser Harrison modestly says that " this book is not intended to be a substitute for more erudite publications upon the criminal law, laws of evidence, rules of procedure, and the art of advocacy . . . ," but nevertheless practically everything of significance is to be found in it, and a better guide could not be devised. Anyone who uses it to prepare a case, and during a case, can be assured that his powers will be enhanced, and that he will give good service to his client and to his profession.

The book begins with an interesting chapter on that much neglected subject " the client." That this is a highly original way of approaching the subject is a commentary on the practical value to the practitioner of the more elaborate works which have nothing to say about the client. In eight pages Mr. Fraser Harrison summarises a large amount of advice on clients, and there are few who can afford to neglect what he says. The only point left untouched is the question of costs, and this reviewer ventures to suggest that some observations might be made about costs, when the next edition appears. In saying this, he has not overlooked the passage about barristers' fees, at page 41, but the subject is so important that one would like to see it treated in detail, and enriched by some of Mr. Fraser Harrison's pithy comments. In particular, the advice about trial by jury (pp. 11 and 12) presumably must include guidance about the expense likely to be involved. This question about jury trial is included in Chapter 2, succinctly headed " Where to plead," and the book then goes on to discuss " the plea and the pleader," (with a very interesting note at p. 23 about previous convictions), " committal proceedings," " witnesses," (here observe what is said at p. 36 about interviewing police witnesses), " preparation for summary trial," " procedure at a summary trial," " advocacy," " the prosecutor," " evidence," " appeal in criminal matters," " domestic proceedings," " bastardy," and " the Coroner's Court." It concludes with a most useful appendix listing the " indictable offences by adults which may be dealt with summarily with the consent of the accused," and another appendix showing the right of appeal to Quarter Sessions. The index is both simple and excellent.

Enough has been said to show that this is a book of great value, and that it certainly should be in the library of anyone who has any concern with Petty Sessions, and many who have no such concern, but it is necessary to add that the style is a delight. Mr. Uriah Heap interrupted his nocturnal study of Tidd's *Practice* to observe " Oh, what a writer Mr. Tidd is, Master Copperfield," but Tidd (however beautifully he wrote) can hardly have coupled amusement with instruction in the way which apparently Mr. Fraser Harrison finds easy. A few quotations may be pardoned. " It is surprising how foolish businessmen can be over dates, and nothing is more infuriating than to arrive at the court and have to spend a hectic half-hour telephoning all over town to trace an important witness." " If the unfortunate client has to remember two stories, the true and the fabricated, it is inevitable that he will make mistakes." " Do not attempt to conceal weak points. Candour minimises their importance; unsuccessful suppression exaggerates it." " Few people have the ability to give complete attention to an argument for more than a few minutes." " Humour can be a most effective weapon, but it is one that only an experienced man should wield." " Many a prosecution, that would otherwise have failed, has succeeded because the accused's advocate has made an unnecessary and injudicious examination." " A conviction frequently follows an unsuccessful submission of ' No case to answer.' " " A policeman's note is no more protected than any other, although many courts go out of their way to prevent an accused's advocate from seeing it." Finally, " Nothing is more pathetic than an advocate who mutters and threatens an appeal."

HECTOR MUNRO.

Privileged Communications Between Physician and Patient. By Clinton DeWitt. Charles C. Thomas, Springfield, Illinois; Ryerson Press, Toronto; Blackwell Scientific Publications, Ltd., Oxford. 1958. xviii and 528 pp. (No price stated.)

Professor DeWitt's book is primarily concerned with the law in those of the United States which have made legislative provision for privilege in respect of information obtained by a medical practitioner from his patient. An English reviewer must assume the accuracy of the statements of law, and he may envy the latitude which permits such comment as " The decision is absurd; two judges dissented " (p. 63). The citations include comparative statutory provisions, which are also printed in a useful appendix, multitudinous cases, and much periodical literature. Indeed this book is a most thorough study of the subject, almost too detailed by English standards. It is elaborately produced; though on more than one page footnotes and text are misplaced and the index is not always reliable.

Where the common law prevails there is no privilege for medical communications. But statutory exceptions exist in parts of the British Commonwealth, such as Quebec, Victoria and New Zealand, and in thirty-three of the United States and a number of connected jurisdictions. The question whether the privilege should be accorded is of interest in other systems of law, and was one of the subjects on the agenda of the Fifth Congress of the International Academy of Comparative Law, held at Brussels in August 1958. The publication of this book, therefore, suggests further consideration of the problem; in particular whether there is any case for the recognition of privilege for medical communications in England.

Privilege from disclosure in a court of law requires the clearest justification. This may be sought either on principle or in practice, but efforts to justify the privilege on principle have been noticeably feeble. A typical example is to be found in a dictum on the New York statute of 1828, reputed to be the first Act granting medical privilege. "To open the door" (it was said) "to the disclosure of secrets revealed on the sick bed, or when consulting a physician, would destroy confidence between the physician and the patient, and, it is easy to see, might tend very much to prevent the advantages and benefits which flow from this confidential relationship." One fallacy in this argument is the erroneous assumption as to the attitude of the patient—who, when he consults a doctor, usually has no thought of possible legal proceedings and still less any inkling of the law of evidence. In this respect there is no parallel between the case of the patient and that of the client consulting his solicitor, at least about contentious business. It is perhaps not surprising that in New York the privilege has now been extended to such secrets as are confided to dentists. Little justification for the privilege can be derived from its practical operation. In those jurisdictions where it is recognised, the law on the subject abounds in qualifications and refinements, as the author shows. Apart from differences in the statutory provisions, some of which exclude all or particular criminal cases while others exclude all or various types of civil action, there are numerous decisions as to who is a practitioner, who is a patient, what communications and other kinds of information are protected, when and how the privilege may be claimed, and what constitutes waiver. The latter topic occupies over one hundred pages of the book. This mass of case-law has resulted in the usual anomalies, and is a poor recommendation for the introduction of similar complexities into other jurisdictions.

Professor DeWitt thinks that the privilege may be "on the way out" (p. 38). But, despite the advice of their consultants, the bodies responsible for the American Model Code and the Uniform Rules of Evidence have attempted to perpetuate the privilege. In view of the pronounced differences of opinion in America and elsewhere, there may well be efforts to extend the privilege to other jurisdictions, particularly in litigation involving artificial insemination. An extension may also be demanded for communications to persons who are not medical practitioners, for instance, those compendiously described as "healers of the mind" (p. 87). If the matter ever becomes of importance in England, a solution in the nature of a compromise might be found by hearing the evidence *in camera*.

G. D. NOKES.

Trial for Treason. By G. W. Keeton, M.A., LL.D. London: Macdonald & Co. 1959. 252 and (index) 4 pp. 21s. net.

Professor Keeton here reassesses the events and significance of four treason trials of the past 450 years; those of the Earl of Essex, Alice Lisle, Lord Lovat and Sir Roger Casement. Of the four, perhaps only the second and last are expected choices for inclusion in a book such as this and in these Professor Keeton has succeeded, as in the other accounts, in making points of fresh interest to both lawyer and layman.

In writing of treason trials the temptation is to sacrifice accuracy to drama, for such trials include all the elements which make for popular interest in murder trials, heightened by the pressure of great events and the participation of the famous.

It is therefore all the more to Professor Keeton's credit that he has not only altogether eschewed the temptation to dwell overlong on or magnify the more sensational aspects of his subject but has also succeeded in writing a book which, whether examining the legal validity of the trial of Alice Lisle or picking a way through the complexities of the 'Forty-five, is to be commended for the clarity of its writing and the balance of its approach. Nowhere is this balance more evident than in the account of Casement and the events of Easter Week, 1916. Here Professor Keeton writes with both clarity and accuracy, qualities which have often been lacking in past accounts of the Irish Rebellion.

This is a pleasing addition to the legal bookshelf.

R. C. C.

Books received:

Practice and Theory of Probation and Parole. By David Dressler. Columbia University Press; London: Oxford University Press. 1960. 48s. net.

Harris's Criminal Law. Twentieth edition by H. A. Palmer and Henry Palmer. London: Sweet & Maxwell, Ltd. 1960. 689 and (index) 15 pp.

Handbook on the Criminal Procedure Act and the Criminal Provisions of the Magistrates' Courts Act. Second edition by W. E. Cooper, B. R. Bamford and R. M. Marais. Juta & Co.; London: Sweet & Maxwell, Ltd. 1960. 243 and (index) 60 pp. 45s. net.

Edward I and Criminal Law. By T. F. T. Plucknett. Cambridge University Press. 1960. 101 and (index) 2 pp. 16s. net.

Through Seven Reigns: A History of the Newport Police. By Islwyn Bale. 143 and (index) 3 pp. 7s. 6d. net.

Russians at Law. By Lionel Daiches. London: Michael Joseph. 1960. 202 and (index) 6 pp. 21s. net.

Alibi for a Judge. By Henry Cecil. London: Michael Joseph. 1960. 206 pp. 13s. 6d. net.

Anatomy of Prison. By Hugh J. Klare. London: Hutchinson. 1960. 159 pp. 18s. net.

Readers' digest:

Courts: The jury system: 229 *Law Times* 77.

Homicide: Some observations on diminished responsibility: [1959] *Juridical Review* 109.

Intent: The guilty mind in the criminal law: 76 *Law Quarterly Review* 78.

Magistrates' courts: "Begun to try" (summary trial of indictable offences): 229 *Law Times* 92.

Road traffic: Notice of intended prosecution: 124 *Justice of the Peace* 93.

Road traffic: Service of notice of alleged offence: 124 *Justice of the Peace* 133.

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Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review, 11 New Fetter Lane, E.C.4. Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

THE
CRIMINAL LAW
REVIEW

May 1960

Police questioning

One of the factors contributing to the setting up of the Royal Commission on the police was the growing public disquiet, much agitated by the Press, as to the practice of the police in questioning suspects.

A few examples of abuses of police powers leading to indiscriminate allegations of " third degree " methods revealed how little is generally known of the legal difficulties surrounding the operation of the Judges' Rules which govern the questioning of suspects by the police. In particular, great difficulties spring from the often inconsistent line taken by the courts towards breaches of the Rules.

These difficulties have, from time to time, engaged the attention of a number of writers on criminal law, and the receipt, within a few weeks of each other, of articles by Dr. Glanville Williams and Mr. Ian Brownlie, covering between them most of the problems involved, has led us to devote the whole of the article space in this issue to the subject of police interrogation. Mr. Christopher Williams and Professor J. C. Smith of the Editorial Board, have added their views to those of Dr. Williams and Mr. Brownlie.

It is to be regretted that the Royal Commission intend only to consider these matters in so far as they affect the confidence of the public in the police. It is apparently considered that the findings of the Royal Commission on Police Powers and Procedure in 1929 do not need to be brought up to date.

The subject is one of great public importance and we hope that this symposium of views will stimulate our readers' interest.

Metropolitan Police Cadet Corps

The Metropolitan Police have gained Home Office approval for a new scheme designed to improve recruitment and minimise wastage among recruits. The present cadet force is to be reorganised and built up into a corps of 1,500 who, it is hoped, will eventually provide about one-half of the normal yearly recruitment to the regular police force.

Boys will join the corps at any age between 16 and 18½ and will take their place in the training scheme according to qualifications. The first two years of training will be devoted to general education, including the taking of the General Certificate of Education to the highest possible level attainable by each boy, physical education and character training, with an introduction to vocational training and work. During this part of the course the boys will live first in a residential training school and then in cadet section houses or hostels. At the age of 18 the physical education will be continued but academic instruction will be replaced by a progressive planning syllabus of instruction in and preparation for police duties.

The scheme has been prompted by the fact that wastage during the early years of police service among recruits joining the police from the present cadet force has been a mere fraction of the wastage among men joining the police direct as constables.

The educational advantages of a scheme such as this one should enable the police to compete with industry in offering a career to the more intelligent boys leaving school at 16 and 17. The possibility that boys may win scholarships to universities as a result of the scheme has not been overlooked.

Criminal Appeals, contempt and habeas corpus

The new Administration of Justice Bill introduces some much needed reforms in criminal procedure.

The provision for appeals in criminal matters from the Divisional Court of the Queen's Bench Division to the House of Lords will give general satisfaction. This is a reform often advocated by Lord Goddard, who has been echoed by his successor. Leave to appeal is to be obtained from the Divisional Court or the House of Lords; but the former court must certify that a point of law of general public importance is involved and the point must be one which ought to be considered by the House of Lords.

The anomalous function of the Attorney-General in relation to appeals from the Court of Criminal Appeal will be abolished. That court or the House of Lords will be able to give leave to appeal, subject to the restrictions applying in the case of the Divisional Court. One hopes that the courts will not be slow to discern a point of law of *general* public importance. At present a point of *exceptional* public importance is required. Attorneys-General have not been generous in granting the certificate, and the slight change of wording will justify greater generosity from judges anxious to further the cause of certainty in the criminal law.

Further provisions of the Bill relate to contempt of court and habeas corpus. These provisions have been criticised by *The Times,* which describes the Bill as offering "half a loaf" and suggests that no bread might be a better choice. The Bill would no doubt benefit from amendment, but this severe view is unjustified.

The substantive law of contempt is to be reformed. Persons who take reasonable care will benefit from a relaxing of the hard law at present governing the publication and distribution of matter calculated to interfere with the course of justice. And, with judicious exceptions, it will not be contempt to report the proceedings of courts sitting in private. We think that in so providing and in proposing a right of appeal in almost all cases of contempt, the Bill does all that is really required.

The Times' main objection is that the channel of appeal will vary according to the nature of the court finding the contempt. This, it is said, will hamper the creation of a consistent body of law. The problem is surely exaggerated. The two lower appeal courts (the Court of Appeal and the Divisional Court) will be bound by the decisions of the House of Lords, and they may be expected in practice to follow each other's decisions with fair regularity. A suggestion that the Court of Appeal should be the intermediate appeal court in all cases has been plausibly answered: that court has never had and does not want jurisdiction in any "criminal cause or matter," and it is a busy enough court already.[1] It is possible also that the problem of what constitutes contempt may vary according to whether the contempt relates to a civil or a criminal proceeding.

Another overdue reform proposed by the Bill is the provision of a right of appeal in habeas corpus proceedings. In a criminal case the appeal will be from the Divisional Court to the House of Lords, and it is arguable here that, while leave should as in other cases be required, there should be an exception to the requirement that a point of law of general public importance exist.

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[1] Lord Parker C.J. in the debate on second reading: H.L. Debates, Vol. 22, col. 266.

Traffic wardens and "ticket fines"

Early in 1959 Capt. Athelstan Popkess, C.B.E., the then Chief Constable of Nottingham, submitted to the Home Secretary a scheme for making use of civilians in the day-to-day control of traffic, thereby relieving the pressure on the police force. At the time this suggestion was greeted with considerable opposition by the police and others, but now the Government, in the new Road Traffic and Roads Improvement Bill, has incorporated this idea and also introduced a system of "ticket fines."

Section 1 of the new Bill deals with the offences which may be the subject of ticket fines and states that these must be punishable on summary conviction. The three groups of traffic offence are those concerned with being without lights and reflectors, obstruction by unattended parking and non-payment of parking charges. A notice will be attached to the vehicle giving the offender the opportunity to pay the fine within fourteen days to a prescribed justice's clerk, failing which the prosecution will go forward in the normal way. The penalties are to be either £2 or half the amount of the maximum penalty for the first offence, whichever is the less.

Section 2 is concerned with the introduction of civilian traffic wardens who, it is intended, shall be recruited by the Police Authority in England and Wales from suitable and adequately qualified persons. Wardens are to have precise duties controlling school crossings and street parking areas, and organising the flow of traffic. They will wear a special uniform and cannot be used for any other police function, nor can any police constable be employed as a traffic warden.

We welcome these two measures for dealing with minor motoring offences, which may serve to relieve some of the pressure on the police and on the magistrates' courts.

The Lord Chancellor's advice to magistrates

The Lord Chancellor, speaking to the North East Branch of the Magistrates' Association, drew to their attention the problem of disparity between penalties given by neighbouring benches in apparently identical circumstances. He gave four rules for the guidance of magistrates. They were: Do not rush your cases, do not be rude to anyone in court, recognise your prejudices and put them on one side, and study fines imposed elsewhere so that there is more conformity.

He explained that he was aware of the difficulties of magistrates when their lists were overcrowded, but he emphasised the importance of justice not only being done but of manifestly being seen to be done, which would not be so if they rushed through their lists.

The question of uniform penalties is obviously a very difficult one; there can be no hard and fast rule as the circumstances of individual cases must vary. However, as the Lord Chancellor pointed out, the difference in penalties imposed, frequently by neighbouring benches, was so great that it could not be due solely to varying circumstances, but must also arise from the different outlook of the magistrates. He suggested that magistrates should study fines imposed by other benches, and this although difficult to achieve might go some way towards answering the problem.

We are at present studying the possibility of introducing a new feature designed to provide magistrates with the kind of information about penalties given in different parts of the country which would assist them in taking the Lord Chancellor's advice. It is impossible to carry out a scheme of this kind without the assistance and co-operation of magistrates' clerks throughout the country. We would appreciate any readers' suggestions or offers of assistance in collecting the relevant information.

Judicial appointments

Mr. Robert Henderson Blundell has been appointed Chief Metropolitan Magistrate on the retirement of Sir Laurence Dunne, M.C., on April 18.

Mr. Evan Roderic Bowen, Q.C., has been appointed Recorder of the Borough of Swansea.

Mr. Joseph Thomas Malony, Q.C., has been appointed Recorder of the City of Southampton.

Police Questioning, Custody and Caution

By IAN BROWNLIE, M.A.
Lecturer in Law in the University of Nottingham

Police procedure in the matter of questioning persons suspected of crime and administering cautions has been the subject of comment, judicial and otherwise, since the Metropolitan Police Act, 1829. However, further comment can be justified by the considerable confusion which still attends this subject and the possibility that the present practice, in so far as it is ascertainable, does not accord with good policy. It is admitted at the outset that it is difficult to achieve a correct balance between the need to ensure that the police have the means, within the law, of efficiently investigating crime and the desirability of protecting persons suspected or accused of crime from practices which militate against a fair trial.

The authoritative guidance which the police have is, of course, to be found in the Judges' Rules approved by the judges of the Queen's Bench Division.[1] It will be convenient here to set out those rules which will be the subject of comment in the pages which follow:

1. When a police officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information can be obtained.
2. Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking any question or any further questions, as the case may be.
3. Persons in custody should not be questioned without the usual caution being first administered.
4. If the prisoner wishes to volunteer any statement, the usual caution should be administered. . . . .

[5. Caution to prisoner " when he is formally charged."]

7. A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing all ambiguity in what he actually said. For instance, if he has mentioned an hour without saying whether it was morning or evening, or has given a

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[1] Text in Roscoe, *Criminal Evidence*, 16th ed., p. 50; Phipson, *The Law of Evidence*, 9th ed., p. 269; Archbold, *Criminal Pleading, Evidence and Practice*, 34th ed., § 1118; Stone, *Justices' Manual*, 1952, p. 365. The first four are quoted in *R.* v. *Cook* (1918) 34 T.L.R. 515.

day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.

8. When two or more persons are charged with the same offence and statements are taken separately from the persons charged, the police should not read these statements to the other persons charged, but each of such persons should be furnished by the police with a copy of such statements, and nothing should be said or done by the police to invite a reply.

The rules are not free from ambiguities and after the Report of the Royal Commission on Police Powers and Procedure had revealed the differences of opinion on their construction among police officers the Home Secretary, with the approval of the judges, issued a circular dated June 24, 1930 (536053/29).[2] One cause of confusion was the possible inference from rules 2 and 3 that questioning after caution was permissible. The Home Office circular negatived such an inference:

> " Rule (3) was never intended to encourage or authorise the questioning or cross-examination of a person in custody after he has been cautioned, on the subject of the crime for which he is in custody, and long before this Rule was formulated, and since, it has been the practice for the Judge not to allow any answer to a question so improperly put to be given in evidence; but in some cases it may be proper and necessary to put questions to a person in custody after the caution has been administered, for instance, a person arrested for burglary may, before he is formally charged, say, ' I have hidden or thrown the property away ' and after the caution he would properly be asked, ' Where have you hidden or thrown it? '; or a person, before he is formally charged as an Habitual Criminal, is properly asked to give an account of what he had done since he last came out of prison. Rule (3) is intended to apply to such cases and, so understood, is not in conflict with and does not qualify Rule (7) which prohibits any question upon a voluntary statement except such as is necessary to clear up ambiguity."

The circular also provided some guidance on what constitutes " custody ":

> " Prima facie the expression ' persons in custody ' in Rule (3) applies to persons arrested before they are confined in a police

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[2] See Phipson, *loc. cit.*; Archbold, *op. cit.*, § 1119; Moriarty, *Police Law*, 13th ed., p. 65; Stane, *op. cit.*, p. 365, note. Two supplementary circulars of 1947 and 1948 approved by the Lord Chief Justice will be found in Stone, pp. 367–368. They relate to details of procedure in taking statements.

> station or prison but the Rule equally applies to prisoners in the custody of a gaoler. The terms ' persons in custody ' and ' prisoners ' are therefore synonymous for the purpose of this Rule."

It will be convenient to recall briefly the law relating to the admissibility of confessions of crime and of statements obtained by the police in breach of the Judges' Rules. A confession of crime is only admissible against the party making it if it is voluntary, made otherwise than as a consequence of a temporal inducement relating to the prosecution held out by a person in authority.[3] Moreover the burden of proving that a confession was voluntary lies on the prosecution and thus in the leading case of *R.* v. *Thompson*[4] the Court for Crown Cases Reserved held that a confession was inadmissible when the chairman of the company the money of which the accused was charged with embezzling had said to the brother of the accused, " It will be the right thing for your brother to make a statement." The court also held that it was for the prosecution to prove that the remark had not been communicated to the accused.

When there is no question of an infringement of the rule relating to inducements but statements have been obtained in circumstances in which the Judges' Rules have not been observed the statements so obtained are not as a matter of law inadmissible but may be excluded in the discretion of the court.[5] Thus the rule relating to confessions simply and directly governs admissibility; on the other hand, the Judges' Rules are rules of practice, primarily for the guidance of the police, and their breach *may* lead the court to exercise its discretion to exclude. Assuming there is no pressure or inducement which leads to inadmissibility under the confessions rule—and it must be remembered that some very minor matters have been held to constitute inducements—there is no principle of law which creates an automatic link between other improprieties on the part of the police and the admissibility of statements.

Judicial authorities relating to police questioning

Historically and analytically there is a close connection between the following situations: questions by the police to a suspected person not yet in custody, questions put to a person in custody, and, in either case, statements made as the result of a threat or inducement on the part of the police. At one time the courts trusted the police so little that they disapproved of any evidence contained in answers to questions put by the police to suspected persons. As a result in the period before *R.* v. *Baldry* [6] was decided trifling matters were considered to amount to inducements. Even when the courts began to take a narrower view of what constituted an inducement, the status of evidence obtained by questioning persons in custody long remained a matter of doubt. In *R.* v. *Gavin* [7] and *R.* v. *Male*,[8] decided in 1885 and 1893 respectively, statements made by prisoners in custody as a result of cross-examination by a constable were excluded. However in *Rogers* v. *Hawken* [9] a Divisional Court stated that " *R.* v. *Male* must not be taken as laying down that a statement of the accused to a police constable without threat or inducement is not admissible. There is no rule of law excluding statements made in such circumstances." This was a case of questions *before arrest* [10] but the court did not regard custody as the criterion of admissibility.[11] In *R.* v. *Gavin* and probably in *R.* v. *Male* custody was so regarded.[12] In a dictum in *R.* v. *Knight and Thayre* [13] Channell J. referred to the case of a constable putting questions after arrest and said:

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[3] *R.* v. *Baldry* (1852) 2 Den. 430; Phipson, *op. cit.*, p. 265.

[4] [1893] 2 Q.B. 12. See also: *R.* v. *Chadwick* (1934) 24 Cr.App.R. 138; *Kuruma* v. *R.* [1955] 1 All E.R. 236, 240 (P.C.); *R.* v. *Jones* [1955] Crim. L.R. 109, Beds. Quarter Sess.

[5] Phipson, *op. cit.*, p. 269; Cross, *Evidence*, p. 440; Kenny, *Criminal Law*, 17th ed., p. 494; *R.* v. *Voisin* [1918] 1 K.B. 531, is the case most commonly cited for this proposition. See also, in support of this view of the law: *R.* v. *Jacoby*, *The Justice of the Peace*, Vol. 86 (1922), p. 248; *The Times*, May 23, 1922 (C.C.A.); *R.* v. *Pattison* (1929) 21 Cr.App.R. 139; and cases cited *infra*, note 32; *cf. The Justice of the Peace*, Vol. 86 (1922), p. 213.

> " . . . When he has taken anyone into custody, and also before doing so when he has already decided to make the charge, he ought not to question the prisoner . . . I am not aware of any distinct rule of evidence that, if such improper questions are asked, the answers to them are inadmissible, but there is clear authority for saying that the judge at the trial may in his discretion refuse to allow the answers to be given in evidence."

In *R.* v. *Booth and Jones* [14] he stated the same opinion and the Court of Criminal Appeal observed that " the principle was put very clearly by Channell J." The trend of authority in 1910 was thus in favour of making "custody" a criterion to which a court could refer in deciding how to exercise its discretion in the matter. It is important to notice that Channell J. in the two cases just cited *for the particular purpose of exercising the discretion to exclude* equated a decision to charge with an actual taking into custody and also that Darling J. giving the judgment of the Court of Criminal Appeal in the latter case said:

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[6] (1852) 2 Den. 430. See *R.* v. *Furley* (1844) 1 Cox C.C.; *R.* v. *Harris, ibid.* 106.

[7] (1885) 15 Cox C.C. 656.

[8] (1893) 17 Cox C.C. 689 See also *R.* v. *Morgan* (1895) 79 J.P. 827, and *R.* v. *Histed* (1898) 19 Cox C.C. 16.

[9] (1898) 67 L.J.Q.B. 526. See also *R.* v. *Hirst* (1896) 18 Cox C.C. 374.

[10] See also *R.* v. *Brackenbury* (1893) 17 Cox C.C. 628; *R.* v. *Berriman* (1854) 6 Cox C.C. 388; and *R.* v. *Miller* (1895) 18 Cox C.C. 54.

[11] See cases cited in last note, and *R.* v. *Goddard* (1896) 60 J.P. 491.

[12] See also *R.* v. *Histed,* note 8, *supra.*

[13] (1905) 20 Cox C.C. 711.

[14] (1910) 5 Cr.App.R. 177, at p. 179 (C.C.A. at p. 180). On the view taken of custody by Channell J. and the C.C.A., see also *Lewis* v. *Harris* (1914) 110 L.T. 337, at p. 340.

> "The evidence before the learned judge was that the person putting the questions had not determined to take the prisoner into custody, and he had to make up his mind whether that was so or not. The learned judge came to the conclusion that there was no evidence to justify him in holding that the interrogator had already determined to take Booth into custody or that he was then practically in custody. I say 'practically' because physical custody is not necessary to make such evidence inadmissible."

In *R.* v. *Best*[15] the Court of Criminal Appeal disapproved of *R.* v. *Gavin*, but that decision was not expressly overruled.[16] However Lord Sumner in *Ibrahim* v. *R.*[17] was in error in saying that the actual decision in this case was simply that the proviso of section 4 of the Criminal Appeal Act did not apply.

Giving the opinion of the Board in *Ibrahim* v. *R.*, Lord Sumner reviewed the authorities and concluded somewhat tentatively that the balance of authority was in favour of the admissibility of statements by prisoners.[17]

Viewing the authorities up to *Ibrahim* the principle which has most support is that statements made by persons in custody in answer to police questioning are admissible but that the court has a discretion to exclude them. Two other points emerge. In the first place the discretion to exclude may be exercised where there is no custody in the strict sense. Secondly, the discretion is in the widest terms since regard may be had to the "general circumstances of the case."[18]

The law was, however, still uncertain. Judicial condemnation of cross-examination of persons in custody continued to appear,[19] and it was accepted that the police might ask questions of a person not in custody.[20] However, in spite of the opinions expressed in *Ibrahim* v. *R.* and previous cases, the following passage occurs in the judgment of the Court of Criminal Appeal in *R.* v. *Gardner and Hancox* [21]:

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[15] [1909] 1 K.B. 692; 78 L.J.K.B. 658; 2 Cr.App.R. 30; 100 L.T. 622. The judgment is extremely brief.

[16] But see Lush J. in *R.* v. *Firth* (1913) 8 Cr.App.R. 162, at p. 163.

[17] [1914] A.C. 599, at p. 614. He speaks of a "probable opinion" of the present law. In any case the only issues for the Judicial Committee were whether the trial court had had jurisdiction and whether "principles of natural justice" had been violated. See also *The Justice of the Peace*, Vol. 82 (1918), p. 115.

[18] Lord Sumner in *Ibrahim* v. *R.*, *loc. cit.*, at p. 614; *R.* v. *Knight and Thayre*, *loc. cit.*; *R.* v. *Miller*, *loc. cit.*

[19] *R.* v. *Winkel* (1912) 76 J.P. 191; *R.* v. *Gardner and Hancox* (1915) 11 Cr.

"That statement, made by Hancox, was obtained in pursuance of a practice which [Crown Counsel] tells us prevails among the police; it is a practice, after men have been separately charged, of charging them together with the same offence with which they have already been separately charged, and reading over to them statements made by the others behind their backs. That is a practice which must certainly be condemned. It is a form of cross-examination after arrest, and the police have been told over and over again from the bench that they have no right to cross-examine a prisoner after he has been arrested and charged. The difficulty is that, notwithstanding that the practice is to be condemned, there are decisions that when the practice is followed, and the advice given to the police disregarded, if the prisoner answers the statement, and makes anything in the nature of a confession, or says anything material, his statement cannot be excluded in evidence . . . *Some day the authorities may have to be reconsidered*,[22] but the court is not prepared to say that the statements made by Hancox were not admissible in evidence, while repeating that if the practice is followed for the purpose of obtaining confessions or admissions it is reprehensible and ought to be discontinued."

In *R.* v. *Crowe and Myerscough* [23] Crowe was indicted for murder by performing an illegal operation and Myerscough with aiding and abetting her. Myerscough made a statement containing admissions in answer to questions put to her by a police officer before arrest. On the question of admissibility Sankey J. expressed himself as follows:

"I quite agree to the statement to which my attention has been called that, by the law of England, no person ought to be made to criminate himself . . . If there is evidence of an offence, a police officer is justified in putting questions to a suspected person in order to ascertain whether or not there is fair and reasonable ground for apprehending him. But even this course should be very sparingly

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App.R. at p. 267; *R.* v. *Matthews* (1919) 14 Cr.App.R. 23; *R.* v. *Taylor* (1923) 17 Cr.App.R. 109; *R.* v. *Turner* (1926) 19 Cr.App.R. 171.

[20] *Lewis* v. *Harris, loc. cit.*; *R.* v. *Crowe and Myerscough* (1917) 81 J.P. 288.

[21] 11 Cr.App.R. at p. 269.

[22] Writer's italics.

[23] (1917) 81 J.P. 288; (Central Criminal Court).

resorted to . . . In my view if a police constable has determined to arrest a person, or if a person is in fact in custody, then he should ask no questions which will in any way tend to prove the guilt of the person in custody from his own mouth. But in the present case Mrs. Myerscough (1) was not in custody; (2) the police had not determined to arrest her."

Having regard to these circumstances and her own statement that she made the statement voluntarily he concluded that it was admissible.

In two decisions reported in 1918 the Judges' Rules were considered judicially for the first time. In *R.* v. *Voisin* [24] the accused while in custody but without being cautioned was asked by the police to write the words "bloody Belgian," which he did. The Court of Criminal Appeal quoted Lord Sumner's version of the confessional rule in *Ibrahim* and continued:

"The point of that passage is that the statement must be a voluntary statement. Any statement which has been extorted by fear of prejudice or induced by hope of advantage held out by a person in authority is not admissible. As Lord Sumner points out, logically these considerations go to the value of the statement rather than to its admissibility. The question whether the person has been duly cautioned before the statement was made is one of the circumstances which must be taken into consideration, but this is a circumstance on which the judge should exercise his discretion. It cannot be said, as a matter of law, that the absence of a caution makes the statement inadmissible. . . . It is desirable in the interests of the community that investigations into crimes should not be cramped. The Court is of opinion that they would be most unduly cramped if it were to be held that a writing voluntarily made in the circumstances here proved was inadmissible in evidence."

At the very end of the judgment the court observed:

"In 1912, the judges, at the request of the Home Secretary, drew up some rules as guides for police officers. These rules have not the force of law, they are administrative directions the observance of which the police authorities should enforce on their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners contrary to the spirit of these rules may be rejected as evidence by the judge presiding at the trial."

Some aspects of the decision call for comment. The court quotes the *Ibrahim* case on the confessions rule but not on the point at issue—a point on which Lord Sumner was far from certain.[25] It does not expressly follow *Ibrahim* (in so far as it was authority on this point) nor even *R.* v. *Best.*[26] It is a somewhat delicate task to decide what is the *ratio decidendi* of *Voisin.*[27] The two grounds of appeal were misdirection and misreception of evidence. On the second point the court emphasised that the statement was voluntary and therefore admissible and at the same time reviewed in rather untidy fashion the grounds for exercising a discretion to exclude statements made by persons in the custody of the police. It is said that the absence of a caution does not, as a matter of law, make the statement inadmissible. From this and from the latter part of the judgment relating to the Judges' Rules it might be inferred that any breach of the Rules justifies the exercise of this discretion to exclude. However, elsewhere in the judgment,[28] it is said that the discretion should only be exercised if there were something in the nature of a " trap," or " manufacture " of evidence or if there was " an unguarded answer made in circumstances that rendered it unreliable, or unfair, for some reason, to be allowed in evidence against the prisoner."

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[24] 13 Cr.App.R. 89; [1918] 1 K.B. 531; 87 L.J.K.B. 574; 26 Cox C.C. 224.

In the same year in *R.* v. *Cook* [29] the Court of Criminal Appeal cited *R.* v. *Voisin* and quoted the Judges' Rules. In *R.* v. *Cook* it is simply assumed that voluntary statements by persons in custody are admissible.

In *R.* v. *Grayson* [30] there was no reference to *R.* v. *Voisin* or to the Judges' Rules but a conviction for shopbreaking was quashed on the ground that the only direct evidence against the appellant was his own admissions during examination by police officers (without caution, *semble*) and the statements of police officers who repeated in his presence what the other two prisoners had stated. The court said:

" This sort of proceeding—it was in fact an informal preliminary trial in private by the police—is not fair to prisoners and . . . is not in accordance with principles of English justice."

In *R.* v. *Taylor* [31] Avory J. observed that the Court of Criminal Appeal " has laid it down as a rule that the police must not examine accused persons after they are in custody," and referred to *R.* v.

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[25] *Supra,* note 17.

[26] *Supra,* p. 302.

[27] See the summary in *The Justice of the Peace,* Vol. 82 (1918), p. 80 and the note, *ibid.,* p. 115; headnote in 34 T.L.R. 263.

[28] p. 95. It is difficult, however, to decide whether the court is concerned with admissibility or discretion to exclude in this passage.

[29] 34 T.L.R. 515.

[30] (1921) 166 Cr.App.R. 7. See also *R.* v. *Brown and Bruce* (1931) 23 Cr.App.R. 56; *R.* v. *Dwyer* (1931) 23 Cr.App.R. 156.

[31] (1923) 17 Cr.App.R. 109, at p. 110

Grayson. These two decisions indicate that the court would quash a conviction in such a case.

Nevertheless, in more recent cases the court has accepted *R.* v. *Voisin* as representing the correct view of the law.[32] Neglect of the Judges' Rules does not *ipso facto* result in the inadmissibility of evidence so obtained, nor will the Court of Criminal Appeal quash a conviction merely because questioning in custody and without caution has occurred.

The Judges' Rules: problems of interpretation

Accepting *R.* v. *Voisin* as authoritative the task of determining the meaning and effect of the Judges' Rules may be undertaken. It may of course be said that it is pointless to examine criteria which only affect the exercise of judicial discretion. To this it may be answered that the exercise of discretion in this context is of considerable significance and also that the limits of the discretion are a matter of doubt in so far as the discretion is related to infringement of the Judges' Rules. Furthermore, police officers do not find it easy to apply the Rules and even experienced officers seem uncertain as to when a person is in custody. As will be seen their uncertainty is understandable.

In the first place the Rules and the pre-existing judicial pronouncements leave no doubt that any person whether he be "suspected or not" may be questioned, without a caution being administered, with a view to obtaining useful information, when an officer is endeavouring to discover the author of a crime.[33] There is no duty to reply in such a case but such a duty may exist by statute. Thus the Official Secrets Act, 1920,[34] provides in section 6 as follows:

"It shall be the duty of every person to give on demand to a chief officer of police, or to a superintendent or other officer of police not below the rank of inspector appointed by a chief officer for the purpose, or to any member of His Majesty's forces engaged on guard, sentry, patrol, or other similar duty, any information in his power relating to an offence or suspected offence under the principal Act [the Act of 1911] or this Act, and, if so required, and upon tender of his reasonable expenses, to attend at such reasonable time and place as may be specified for the purpose of furnishing such information, and, if any person fails to give any such information or to attend as aforesaid, he shall be guilty of a misdemeanour."

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[32] *R.* v. *Wattam* (1952) 36 Cr.App.R. 72; *R.* v. *May, ibid.* 91; *R.* v. *Bass* [1953] 1 Q.B. 680; *R.* v. *Little*, *R.* v. *Wilson* [1954] Crim.L.R. 56; Cts.-Martial App.Ct. And, *semble*, in *R.* v. *Straffen* [1952] 2 Q.B. 911, at p. 914, since the reference to the discretion to exclude is ambiguous.

[33] Rule 1; *Lewis* v. *Harris* (1914) 110 L.T. 337, at p. 339; *R.* v. *Knight and Thayre* (1905) 20 Cox C.C. 711, at p. 713; *Rogers* v. *Hawken* (1898) 19 Cox C.C. 122; *R.* v. *Booth and Jones* (1910) 5 Cr.App.R. 177; *R.* v. *Miller* (1895) 18 Cox C.C. 54. *Cf. R.* v. *Cook* (1918) 34 T.L.R. 515. See also Glanville Williams in 66 *Law Quarterly Review* (1950), p. 465, "Demanding Name and Address."

[34] 10 & 11 Geo. 5, c. 75. *Cf.* s. 7 of the Official Secrets Act, 1911 (1 & 2 Geo. 5, c. 28; ss. 66 and 69 of the Explosive Substances Act, 1875 (38 Vict. c. 17; Road Traffic Act, 1930, s. 113 (3).

Questions by the police after caution but before arrest

This situation will normally be covered by Rule 2. This Rule applies when an officer " has made up his mind to charge a person with a crime." [35] And in view of the terms of Rules 1 and 3 and the Home Office circular of 1930 it applies when the person is not in custody, but it distinguishes between a person about to be arrested and one who is in custody. The reality of such a distinction may be questioned. A person who has already been questioned and is then cautioned may well feel that he is already in custody.[36] On the other hand it can be said that normal questioning is still continuing and the caution merely puts the suspect on notice of the seriousness of the questions. Police officers may find it difficult to distinguish the situations covered by Rules 2 and 3 since the time lapse between the decision to charge and the arrest may be non-existent. The solution would seem to be for the police officer to make a decision to charge but merely to give a caution in general terms so that the decision is not communicated to the suspect. Questioning may then proceed until the officer decides to make the formal arrest.

Questioning by the police of persons in custody

The wording of Rule 3 might be understood to permit questioning of persons in custody providing a caution is given first.[37] The Home Office circular of 1930 makes it quite clear that questions put to and cross-examination of a person in custody are not authorised. The circular provides two exceptions to the prohibition: in the case of a person who is to be formally charged as an Habitual Criminal; and where a person arrested for burglary has stated, before being formally charged, that he has hidden or thrown the property away, in which case after caution he may properly be asked "Where have you hidden or thrown it?" Rule 7 provides in part:

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[35] *R.* v. *Miller* (1895) 18 Cox C.C. 54 (but this was before *R.* v. *Best* and the subsequent authorities); also *R.* v. *Brackenbury* (1893) 17 Cox C.C. 628; *Rogers* v. *Hawken* (1898) 67 L.J.Q.B. 526.

[36] See the views expressed in *R.* v. *Knight and Thayre*, *R.* v. *Booth and Jones*, and *R.* v. *Crowe and Myerscough*, *supra*; and see *infra*, p. 308.

[37] It is possible that the C.C.A. took this view in *R.* v. *Booker* (1924) 18 Cr.App.R. 47, at p. 49 *in fine*. See also their judgment in *R.* v. *Bass* [1953] 1 Q.B. 680, at p. 684.

"A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing all ambiguity in what he actually said." There exists judicial authority for the view that a prisoner may be asked to give an explanation as to property found upon him even in the absence of a caution prior to the request. The justification offered is that this often gives the prisoner an opportunity of saying and showing that it was his own.[38] It is to be presumed that this view is no longer tenable and that the request for an explanation of the property found falls under the ban on cross-examination of prisoners as formulated in the Rules and the Home Office circular.

The Rules themselves, the circular and the judicial decisions after *R.* v. *Knight and Thayre* constantly refer to "custody" as a criterion both for the exercise of judicial discretion as to admissibility and for the propriety or otherwise of questioning. Unfortunately this term is never defined although it is not a self-evident concept. Works on evidence and criminal procedure refer to it but do not attempt definition. Moriarty [39] merely repeats what is in the Home Office circular. The question of defining custody may arise in cases concerning the crime of escape.[40] In *R.* v. *National Insurance Commisioner, ex p. Timmis*,[41] the Divisional Court considered the construction of the phrase "undergoing penal servitude, imprisonment or detention in legal custody" in section 29 (1) (*b*) of the National Insurance Act, 1946. However terms should bear a meaning related to their context and function and reference to other uses of the term "custody" is not necessarily relevant.

The Rules do not provide any definition of custody. Rules 2, 3 and 5 indicate that the decision to charge on the part of a police officer does not constitute custody and also that a caution does not connote custody. On the other hand a person may be in custody before he is formally charged. The Home Office circular states that the term applies to persons arrested before they are confined in a police station or prison and to persons in the custody of a gaoler. In *Straffen's* case Cassels J. took the view that " in custody " in the Rules meant in the custody of the police.[42] The Court of Criminal Appeal was ambiguous on this point since it merely decided that Cassels J. was right in exercising the discretion in admitting the evidence of the detective inspector.[43] The language of the judgment nevertheless indicates that they agreed with his view that a Broadmoor patient was not " in custody " for the purposes of the Rules and the case is usually quoted as authority for such a proposition.[44] Assuming that *R.* v. *Straffen* is authority for this it would seem to contradict the Home Office circular in so far as the latter refers to the custody of a gaoler. On the other hand the view expressed is correct in so far as a Broadmoor patient is not in " the hands of a gaoler." Yet if regard is had to the general object of the Rules it is possible that questioning of a Broadmoor patient by police officers is objectionable if such a patient is likely to identify the detaining institution and the police officers. Unfortunately to deny such a right of questioning would make persons in Broadmoor immune from police inquiries and might seriously limit the investigation of crime.

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[38] *R.* v. *Best* [1909] 1 K.B 692; followed on this point in *R.* v. *Liebling* (1909) 2 Cr.App.R. 314.

[39] *Police Law* (13th ed., 1954), p. 65.

[40] *Roscoe, Criminal Evidence* (16th ed., 1952), p. 540; *Russell on Crime* (11th ed., by J. W. C. Turner), p. 359.

[41] [1955] 1 Q.B. 139; see especially at pp. 142–143, the decision of Sir David Davies, Q.C., the National Insurance Commissioner. Lord Goddard C.J. stated, at p. 148, that the section referred to detention "by reason of a legal proceeding or as the result of a court proceeding."

The Judges' Rules were of course for the guidance of the police and relate to police custody. However the principles which they embody apply to military custody also. Thus in the chapter of the *Manual of Military Law* which concerns evidence[45] paragraph 86 states that:

" There are numerous reported cases in which the admissibility of confessions made to, or elicited by, police officers, has been discussed and it cannot be said that the law upon this point is even yet absolutely settled."

The Judges' Rules are then quoted in full and are introduced as being " not rules of law but for the guidance of the civil police."

The comment on the Rules is as follows[46]:

" The principles enunciated in these rules should be applied by persons concerned with the arrest and custody of military offenders, bearing in mind, however, the differences between service conditions and those pertaining to civilians. For instance, a person subject to military law may be ordered to attend the office of the S.I.B., R.M.P. and the fact that he had been so ordered would not render a statement made there inadmissible. If, however, a person, when there, asked for an officer to be present while he was questioned and the request was refused and he was ordered to answer questions, a court might well regard his answers as inadmissible. Courts must distinguish between an order to attend at an office and an order to make a statement.

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[42] [1952] 2 Q.B. 911, at p. 912.

[43] *Ibid.*, at p. 914.

[44] Cross, *Evidence*, p. 441 note; Archbold, *Criminal Pleading, Evidence and Practice*, 34th ed., para. 1119.

[45] *Manual of Military Law*, 1956, Part I, Chap. IV.

[46] The comment has some relation to remarks by Lord Goddard C.J. in the Courts-Martial Appeal Court in *R.* v. *Harris-Rivett* [1956] 1 Q.B. 220, at pp. 228–229. See also *R.* v. *Little, R.* v. *Wilson* [1953] in [1954] Crim. L.R. 56. In both cases Lord Goddard stated the law relating to civil, *i.e.*, non-military, cases in a way which confirms the view taken in the cases cited above, note 32, and in both cases he also remarks that the Rules were laid down for the guidance of police officers.

"Provided that the rules quoted above are observed, any statement obtained will undoubtedly be admissible, unless positive evidence is given that some threat or inducement was held out. Even if the rules are not followed, the statement will still in law be admissible. . . ."

It will be recalled that the case of *Ibrahim* v. *R.* in which Lord Sumner made a tentative statement of the law on the present subject concerned military custody.

Returning to the general question as to what constitutes custody, a difficulty which appears from a reading of the relevant cases is that the courts have at times regarded a person as being in custody from the moment the police officer decides to charge that person with a crime, a view which would seem to contradict, or render nugatory, Rule 2 of the Judges' Rules. Channell J. in observations in *R.* v. *Knight and Thayre* and *R.* v. *Booth and Jones*, quoted above, stated that no questions should be asked when the police officer had decided to make the charge although he had not at that time taken the suspect into custody. In giving the judgment of the Court of Criminal Appeal in the latter case Darling J. took the view that a person was "practically in custody" when the interrogator had made up his mind to take the suspect into custody.[47] In *Lewis* v. *Harris*[48] he again observed that "a constable ought not, if he has made up his mind that whatever the answer may be he will arrest the person to whom he is speaking, to ask that person an incriminating question." However, in that case, as the facts and judgment as a whole indicate, he did not equate this situation with custody. In *R.* v. *Crowe and Myerscough*[49] Sankey J. said that no incriminating questions should be asked "if a police constable has determined to arrest a person, or if a person is in fact in custody."

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[47] See counsel for the prisoner in *R.* v. *Brackenbury* (1893) 17 Cox C.C. 628, at p. 629.

[48] (1913) 110 L.T. 337, 340. See also Avory J. in *R.* v. *Winkel* (1912) 76 J.P. 191, at p. 192.

[49] *Supra*, pp. 303–304.

On the basis of these judicial pronouncements it would seem that a court might still exercise a discretion to exclude even when Rule 2 has been complied with. Alternatively a court might decide on the authority of the cases referred to that in the circumstances a decision to charge was equivalent to taking into custody and that Rule 3 applied, in which case there had been a breach of the Rules whether a caution had been given or not. This approach would accord with the view expressed above that for practical purposes Rules 2 and 3 cover the same situation. However, it may be argued that the Rules seem to assume that the situation covered by Rule 2 is something less than custody and a court should take the view adopted by the Rules. This last argument might be countered to some extent by the fact that Rule 8 does not distinguish between the "Rule 2" and "Rule 3" situations but refers simply to "persons charged" and would seem to equate the making of a charge with taking into custody.

A decision to arrest on refusal to answer questions

This situation is not covered by the Rules. It might be argued that Rule 2 does not apply since there is no definite decision to charge, and even if a decision to arrest is equivalent to a decision to charge, in the present case the decision to arrest is only conditional. Moreover it is not communicated to the suspected person so that it might be argued that there is no element of intimidation. Rule 1 thus applies.[50] In *R.* v. *Wattam* [51] the Court of Criminal Appeal stated that the fact that the police officers might have arrested the appellant if he refused to answer their questions did not put him in custody. If in all the circumstances the trial judge thought there was no restraint then answers obtained in such circumstances were admissible. It might be suggested that in view of the likelihood of arrest a caution would be desirable on the analogy of Rule 2.

Questions by a police officer ignorant of the fact that the person questioned was in custody for the offence of which the answers are material evidence

In *R.* v. *Dwyer* [52] a police officer entered into conversation with the prisoner and unintentionally and without caution asked a question the answer to which constituted material evidence in the case. It was held that the questioning was improper, that the evidence had been wrongly admitted and that the conviction ought to be quashed.

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[50] *Cf. R.* v. *Booker* (1924) 18 Cr.App.R. 47, at p. 49. In this case the accused was already in custody on another charge and the officer concerned stated that he did not intend to charge the appellant but that if he failed to get an answer to his questions he might charge him. Hewart L.C.J. thought that Rule 1 applied, apart from the question of custody on the other charge.

[51] (1952) 36 Cr.App.R. 72, at p. 77.

[52] (1932) 23 Cr.App.R. 156.

"In the particular circumstances of this case, it seems to us that that questioning was improper. . . . We think that the evidence was wrongly admitted, and that in the circumstances the conviction was unsatisfactory and ought to be quashed." A passage from the judgment of the court in *R.* v. *Treacey*[53] is of equal relevance:

"As to the fourth statement, what happened was this: At 1.30 a.m. on March 19, the appellant came to the Rochford police station, and made the statement to which I have referred. Then a doctor was sent for. He obviously required medical attention,[54] and he was taken away to the hospital, but before he left for the hospital he was seen by another police officer. That officer told him in terms that he appeared to be the person for whom they were looking, and that he would be detained at that station on the charge of murdering that girl. That happened somewhere about 1.35 a.m. in the morning. At 3 a.m., or so in the morning, there came another police officer. That police officer said, and his word may be taken, although it seems odd, that he had no idea that this man had been charged with murder, and was being actually detained at the police station on that charge. He himself had come from Southend, because he had heard on the telephone that day that this particular person ought to have surrendered to his bail at the Southend police station, and there was a warrant out for his arrest; and he came to tell him he was going to hold him, if necessary, upon that warrant upon charges of larceny. That was his business, and he said that he did not know that man was already under arrest on the charge of murder. In our view, it makes no difference whether he knew or not; the fact was that the accused was detained upon the charge of murder, and whoever was the senior officer at that police station ought to have seen that, being under arrest on a charge of murder, no question was put to that man about that murder, more particularly in view of the state in which he was, for he was still unable to talk although he could write. What was done was that he was cross-examined by this second police officer. . . ."

At the trial his written answers to the officer's questions were not put in but he was cross-examined on them by counsel and the conviction was quashed. The court stated that the statement was inadmissible. Curiously, they did not refer to the Judges' Rules or the question of discretion in admitting such evidence.

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[53] [1944] 2 All E.R. 229, at pp. 235–236.
[54] He had taken a large number of aspirins.

The Rules do not deal with the precise question of the officer who innocently elicits information on a charge from a person in custody. However the courts would probably consider that Rule 3 applies in view of *R.* v. *Dwyer* and as an inference from *R.* v. *Treacey*. It is possible though perhaps over-ingenious to argue that, since the Home Office circular states that Rule 3 is not intended to authorise questioning or cross-examination of a person in custody after he has been cautioned " on the subject of the crime for which he is in custody," questions unknowingly eliciting relevant facts are not questions on the subject of the crime for which the person is in custody.

Questioning of person in custody before caution

The peculiar formulation of the Home Office circular leads to yet another ambiguity. The circular says that Rule 3 is not intended to authorise questioning of a person in custody *after he has been cautioned*. However, since Rule 3 itself stipulates that those questions which are permitted in the case of a person in custody should be preceded by a caution, the words of the circular presumably are not intended to permit questions before caution. In any case judicial condemnation of questioning of persons in custody has not been qualified by reference to the giving of a caution.[55] If the questions are not permitted the giving of a caution will not obviate a breach of the Rules.

Persons " detained for questioning "

It may happen that persons are asked to accompany a police officer to the police station and the manner of asking has the consequence that the person concerned feels that he is obliged to go. Alternatively, although the manner of asking him to go to the police station is beyond reproach the circumstances surrounding the questioning are such that the person interrogated would, as a man " of reasonable firmness and courage,"[56] feel that he was in custody. In this situation although there may be no specific inducement or intimidation the person questioned is in a very vulnerable position. No doubt some would not lose their composure in this situation but there are many ordinary citizens who might feel compelled to speak.

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[55] *Supra,* pp. 303–304. Indeed before 1930 questioning *after* caution was regarded as permissible in a few cases: *R.* v. *Booker* (1924) 18 Cr.App. R. 47.

[56] *Cf. Munday v. Metropolitan Police District Receiver* [1949] 1 All E.R. 337; *Ford* v. *Metropolitan Police District Receiver* [1921] 2 K.B. 344.

Curiously the courts have at times accepted the existence and propriety of the practice of detaining for inquiries.[57] *R.* v. *Alice James* [58] was an application for leave to appeal. The prisoner had been convicted of the murder of her illegitimate child of seven months. A detective had seen the applicant at the police station and had told her that inquiries were being made as to what had become of the child. She told two contradictory stories as to its whereabouts, one to the effect that it was being brought up by respectable people in the country and the other that she had given it into the charge of a woman in Euston Road. The police wanted to find that woman and rescue the child. At the station the detective-inspector said to her: "You are detained here while we are trying to find your baby. You must tell me all about the woman who, you say, has your baby. I shall take down any statement you make, and if any harm has come to the baby at your hands you will be charged, and any statement will be given in evidence against you at your trial." She then answered questions and two hours later, without any further statement by the inspector, she confessed to the murder of the child. The application was not allowed. The court simply assumed that there had been no inducement to confess. The police procedure received no criticism. There was, however, a caution given to the applicant in this case but it seems contrary in spirit and effect to the later case of *R.* v. *Winkel* [59] in which the accused had been taken into custody prior to being charged and had not been detained merely for questioning. In *R.* v. *Voisin* [60] at the time the appellant was requested to write the words "bloody Belgian" the situation was as follows, described by the court in its judgment:

> ". . . the appellant wrote these words quite voluntarily. The mere facts that they were police officers, or that the words were written at their request, or that he was being detained at Bow Street do not make the writing inadmissible in evidence. . . . There was nothing in the nature of a 'trap' or of the 'manufacture' of evidence. The identity of the deceased woman had not at this

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[57] See for an assertion of the legality of detention for questioning: [1959] Crim.L.R. 79. The author of this note makes no reference either to the Judges' Rules or to *Christie* v. *Leachinsky* [1947] A.C. 573. For a case of detaining for questioning followed by release and apology, the case of William Smith, *Sunday Express*, October 11, 1959. It is not suggested that this is a typical instance.

[58] (1909) 2 Cr.App.R. 319.

[59] (1912) 76 J.P. 191. See *infra*, p. 323.

[60] *Supra*, p. 304 The C.C.A. in *R.* v. *Jacoby* (1922), *The Times*, May 23, *The Justice of the Peace*, Vol. 86 (1922), p. 248, did not make any comment on the fact that the police in that case had kept the accused in custody for seven days without charge and questioning occurred during this time.

moment been established, and the police, though they were detaining the appellant in custody for inquiries, had not then decided to charge him with this crime. . . ."

The significance of *R.* v. *Voisin* has already been discussed but however elusive the *ratio decidendi* may be the acceptance of detention for questioning is clear.

It may of course be difficult to distinguish detention for questioning, custody prior to and in readiness for the making of a charge, and custody coinciding with a charge. Since *Christie* v. *Leachinsky* custody before charge is not lawful except where the prisoner must in the circumstances know what the charge is or prevents the making of a charge by his own actions. " Custody " without the making of a charge is not custody within the meaning of the law relating to lawful arrest. The Judges' Rules are not very explicit in regard to detention for questioning. Rule 3 as interpreted in the Home Office circular in general does not permit the questioning of persons in custody. A difficulty arises, however, since it is probable that the custody in Rule 3 arises when a charge has been made and according to the circular the questions not permitted are those on the subject of the crime for which he is in custody. Moreover the effect of *Christie* v. *Leachinsky* is to link charge and custody. Thus it is possible to argue that detention for questioning, when no decision to charge has been made, offends against neither Rule 2 nor Rule 3, since in the latter case there is no custody within the meaning of Rule 3 nor are the questions on the subject of the " crime for which he is in custody " since he is in custody only for questioning. In short, detention for questioning may fall outside the Rules. Further, the circular in defining " persons in custody " refers to " persons arrested."

Nevertheless the judicial condemnations of questions in custody both before and since 1918 have applied to custody in general [61] and the discretion to exclude even when the Rules have been complied with would surely apply here. Furthermore, to distinguish between a formal arrest and custody would be to drive the proverbial coach and four through *Christie* v. *Leachinsky*.

In *R.* v. *Brown and Bruce* [62] in 1931 the Court of Criminal Appeal decided that statements obtained as a result of questions put to a person in custody after caution but before charge were " within the mischief of *R.* v. *Winkel*," and in view of the admission of answers to such questions at the trial and another unfortunate aspect of the case the convictions were quashed. The court did not, however, directly advert to the problem of detention for questioning, and the question has not received judicial discussion in any reported case since 1931.

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[61] *Cf. R.* v. *Grayson* (1921) 16 Cr.App.R. 7; *R.* v. *Taylor* (1923) 17 Cr.App.R. 109; *R.* v. *Turner* (1926) 19 Cr.App.R. 171.

[62] (1931) 23 Cr.App.R. 56.

What is custody for the purposes of Rule 3?

In some cases there is no detention for questioning in that the police officers do not use any clear words indicating that the suspect is being taken into custody but the circumstances are such that many persons might in fact regard themselves as being in custody. In *R.* v. *Wattam*[63] counsel for the appellant contended that when his client was approached at his lodgings by police officers and asked to accompany them to the police station, this was equivalent to an arrest since he was not told that he was free to refuse to go if he wished. Answers subsequently obtained at the police station should have been excluded. The Court of Criminal Appeal took the view that he had not been taken into custody and the fact that they might have arrested him if he refused to answer their questions did not alter the case. This situation has already received comment.[64] In *R.* v. *Bass*[65] police officers left a message at the appellant's house asking him to go to the police station. When he arrived there he was invited to go into the C.I.D. room. The questioning took place with the door closed and the officers agreed that the appellant would not have been allowed to leave if he had wished to do so. He was questioned for three-quarters of an hour without any caution being administered and during the interview he made statements which amounted to a confession of guilt. The court observed:

> "There can be no doubt, having regard [to the evidence of a detective-constable who had taken part in the interrogation] that the appellant was in custody; that he was questioned without being cautioned and that there was thus a breach of Rule 3 of the Judges' Rules."[66]

The decision on this point in *Bass* depended on the fairly explicit evidence of the situation of the appellant at the police station. More recently in *R.* v. *Joyce*[67] the position of a person after being requested to go to the police station has been considered. In this case police officers called at the accused's house at 11.30 p.m., had some conversation with him regarding accusations made by his daughter and searched his clothing. He was then invited to go to the police station, the detective-inspector concerned being alleged to have said: "I need to take a statement from you." Slade J. admitted statements subsequently made to the police by the accused on the ground that there had been no sufficient inducement in law to render inadmissible a statement resulting from it since the invitation to go to the police station did not relate to the charge or accusation. There was no discussion of the application of the Judges' Rules to the case but a passage in the judgment supports the view that a suspect who is invited in somewhat general and vague terms to go to the police station may feel that he is in custody and that Rule 3 should apply. This was not of course the view taken in *R.* v. *Wattam*. Slade J. in *Joyce* said:

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[63] (1952) 36 Cr.App.R. 72. No caution was given.

[64] *Supra,* p. 314.

[65] [1953] 1 Q.B. 680; 37 Cr.App.R. 51.

[66] If the court was inferring that questioning after a caution would have satisfied Rule 3, this would seem to be *per incuriam*: see *supra*, p. 308.

[67] [1958] 1 W.L.R. 140; 42 Cr.App.R. 19; [1958] Crim.L.R. 188; Central Criminal Court.

> "I think it is right to say that the accused probably would not even have accompanied the police officers to the station if he had not thought, rightly or wrongly, that (to use his own words) 'he had very little choice in the matter'; and I will assume that that was the reason why he did so. I think it is further fair to say that the accused might very well have refused to answer any questions at all . . . if he had not been previously told: 'I need to take a statement from you.'"

It is suggested as a matter of policy and in the absence of authority that a caution should be given in this type of situation to neutralise any feeling of compulsion on the part of the suspect. Strictly speaking, Rules 2 and 3 do not apply in these cases unless the court is fortunate enough to have admissions by police officers of the sort which were made in *R.* v. *Bass*.

R. v. May and cross-examination in custody

The decision in *R.* v. *May*[68] has placed a qualification on the prohibition of cross-examination in custody other than those referred to in Rule 7 and the Home Office Circular of 1930. The appellant had been convicted of office-breaking. While the police officers were following the prisoners, one of the officers saw the appellant drop a white object which was in fact a jemmy wrapped in newspaper. After the prisoners were taken into custody at the police station, the appellant was searched and in his pocket was a small corner piece of newspaper in which the jemmy had been wrapped. The police officer cautioned him and said: "I saw you throw this jemmy away, May, which was wrapped in this newspaper, and as you have now seen, that piece of paper from your pocket fits it exactly." The appellant answered: "Nicked for a bit of paper! You have done me right now. I'd have got away with it but for that." It was contended that this amounted to cross-examination of a prisoner in custody. On this point Lord Goddard C.J. observed:

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[68] (1952) 36 Cr.App.R. 91. *Cf. R.* v. *Turner* (1926) 19 Cr.App.R. 171.

"The court cannot see that this is a case of cross-examination of a prisoner after he was in custody. It may be a very proper thing for a police officer to show a prisoner what is going to be an exhibit in the case and say, 'There you are.'"

The statement was a voluntary one and was admissible.

With respect the decision on this point is not beyond criticism. There would seem to be a difference between allowing the accused to see some object which was to be an exhibit and the case, as in *R.* v. *May*, where a number of hypotheses concerning facts in issue are presented to the prisoner in such a way that he is provoked into comment. In *R.* v. *Winkel* [69] Avory J. took the view that when a police officer remarked to a person in custody who had denied giving any money to a girl that "It is alleged you gave her £5 to pay for the operation," this was a form of cross-examination. It must be admitted however that each case must depend on its facts. In any case Rule 8 permits the bringing to the knowledge of the prisoner the possession by the police of certain evidence, *viz.*, statements by others charged with the same offence, and there is some analogy between this and the confrontation with real evidence as in *R.* v. *May*.[70] And yet Rule 8 stipulates that nothing should be said *or done* by the police to invite a reply and this might extend to an implicit invitation to answer or comment.

The application and interpretation of Rule 8

This rule was considered by the Court of Criminal Appeal in *R.* v. *Mills and Lemon* [71] and the law was stated as follows. Where A and B are charged with the same offence and a statement has been taken from A implicating B in the offence, if a police officer gives a verbal summary of A's statement to B and then by question invites a reply in breach of Rule 8, no evidence can be given at the trial of B of what the police officer has said and done since if it were the jury would be informed that A, who might not be called as a witness, had accused B of complicity in the offence. Lord

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[69] (1912) 76 J.P. 191; (Central Criminal Court); and see *R.* v. *Brown and Bruce* (1931) 23 Cr.App.R. 56.

[70] Reading statements made by other prisoners to a prisoner was described by the C.C.A. in *R.* v. *Gardner and Hancox* as "a form of cross-examination." See also *R.* v. *Adams* (1923) 17 Cr.App.R. 77, in which one prisoner was permitted to make a statement in the presence of another. The court made no comment on this; and *cf.* *R.* v. *Grayson* (1921) 16 Cr.App.R. 7.

[71] [1947] 1 K.B. 297.

Goddard C.J. remarked that the object of Rule 8 was the prevention of a practice by police officers which had introduced evidence in this way to the jury. He went on to say that "if after such a question by a police officer, which cannot be given in evidence, the prisoner chooses to dictate or write a confession, there is no authority that if the answer is intelligible without a recital of the question it cannot be given in evidence." He referred to *R.* v. *Gardner and Hancox*[72] and emphasised that Rule 8 does not result in the inadmissibility of a confession providing the condition last-mentioned is satisfied.

Some other points relating to Rule 8 may be considered briefly. Some police forces hold the view that Rule 8 is to protect prisoners and that there is a duty to furnish each person automatically with a copy of the statement of a person charged with the same offence. In view of *R.* v. *Gardner and Hancox* and the remarks of Lord Goddard C.J. in *R.* v. *Mills and Lemon* the object of the rule is to regulate police practices only if the police decide to bring the statement of one to the notice of another charged with the same offence.[73] The rule does not speak of a formal charge and if it is to be applied effectively the statement should be furnished to the joint defendant before he is formally charged. A further difficulty arises when A, charged and in custody, incriminates B who is still at liberty. Must a copy of the written statement by A be served on B without any interrogation or can B be treated merely as a suspect under Rule 1? Technically Rule 8 does not apply but if the spirit of the thing is regarded B should be given a copy of A's statement and be cautioned before questioning. Apparently this is not done.[74] Rule 8 is intended to apply to offences which justify arrest but the same principles should apply to cases dealt with by summons on the arguments that this accords with the general intention of Rule 8 and that the greater includes the less.[75] Lastly it may be pointed out that the rule will apply to the case in which one person is charged as principal and another as accessory in the commission of the same felony since the law considers that only one crime has been committed.[76]

Questions relating to crimes other than that for which the prisoner is in custody

The Rules do not provide for this situation and indeed the Home

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[72] *Supra*, pp. 303–304.

[73] See *Justice of the Peace and Local Government Review*, Vol. 122, 1958, p. 474.

[74] *Cf. Police Review*, Answers to legal problems, Nos. 3357, 3820.

[75] *Cf. ibid.*, Answer No. 3833 concerning a bicycle theft by two juveniles aged 9 and 12.

[76] *Surujpaul v. R.* [1958] 3 All E.R. 300 (P.C.).

Office Circular of 1930, in explaining Rule 3, refers to the general prohibition of questioning " on the subject of the crime *for which he is in custody*." [77] Yet if the custody of the police is considered to import some element of compulsion—hence the ban on cross-examination—it would be ludicrous to prohibit one class of question but to permit others relating to some other crime.[78] On the other hand it may be difficult to detect crimes if a principal is immune from inquiries by reason of his having been arrested already for a particular offence. All that can be said is that some authoritative and very precise guidance is needed on the point. It seems clear that the existing police practice is to question on other offences.[79]

Evidence of judicial attitudes to such procedure is meagre. However it must be borne in mind that judicial condemnation of cross-examination of prisoners, referred to above,[80] has been in very general terms. No comment was made on this point in *R.* v. *Best* [81] although the prisoner in that case had been in custody on two other charges when questioned regarding the crime for which he was indicted. In *R.* v. *Booker* [82] the Court of Criminal Appeal admitted in evidence on a charge of murder a statement made by the accused in answer to police questioning when he was in custody on a charge relating to a lesser offence. No criticism of the police procedure was made but the authority of the decision may be weakened by the fact that the court took a view of Rule 3 which must now be considered mistaken in view of the Home Office Circular of 1930.[83] In *R.* v. *Treacey* [84] the prisoner was detained on a charge of murder and was cross-examined by a police officer who was investigating charges of larceny. The answers given concerned admissions relating to the charge of murder. The Court of Criminal Appeal was not discussing the precise point concerning questions on other offences but its condemnation of the questioning has very considerable relevance to the present problem. It would be highly illogical if the practice was objectionable in their eyes simply because the questioning *happened* to elicit evidence on the murder charge, and if evidence only as to the larceny had been obtained then nothing improper would have occurred. Evidence obtained by the practice under discussion was excluded in a recent decision by Bedfordshire Quarter Sessions.[85] However the chairman seems to have regarded as material the fact that the matters about which he was questioned were closely linked with the charges for which he was then under arrest in that *all* the matters arose out of the employment of the accused as surveyor in charge of a sewage contract. The significance of this criterion in the present context is obscure.

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[77] Writer's italics.

[78] See commentary [1959] Crim.L.R. p. 446, at p. 448, concluding: "The objections which have led to the exclusion of questioning about the crime for which the prisoner is under arrest apply with at least equal force to questioning about any other crime." See also the Report of the Royal Commission on Police Powers and Procedure, 1928, recommendation xlvii, quoted *ibid.*, which indicates that the wording of the circular of 1930 italicised in the text was not intended to have a restrictive effect. See for correspondence on the subject and Professor Smith's comment: [1959] Crim.L.R. pp. 673–679.

[79] See the correspondence referred to in the last note.

[80] pp. 302–304.

[81] [1909] 1 K.B. 692.

[82] (1924) 18 Cr.App.R. 47.

[83] See Professor Smith, [1959] Crim.L.R., Commentary at p. 448.

[84] *Supra*, p. 313.

Some ancillary questions

Some further questions which are not covered specifically by the Judges' Rules deserve mention. The Rules govern police practice and procedure but presumably they would apply, in the sense of providing guidance to a court in exercising its discretion to exclude evidence, in the case where persons other than police officers have authority, real or apparent, to take into custody. The confessions rule relating to admissibility applies where the inducement has been held out by a person in authority. In *R.* v. *Knight and Thayre*[86] Channell J. considered the general question of examination of suspects, referring to questions by " a police officer, or anyone whose duty it is to inquire into alleged offences." In that case a three-hour interview had been conducted by a travelling clerk in the detective branch of the post office and there was an assumption by the court that general principles applied. The general objection to questioning in custody would apply in principle to questions by anyone likely to be identified with the police by a prisoner, for example, a police surgeon.

There is no prohibition of the taking of statements from persons under the influence of alcohol or drugs. There is some weak authority for the view that statements by a drunken person are admissible,[87] but there is presumably a discretion on the part of the court to exclude such statements.[88] Their weight will certainly be adversely affected. On the other hand in *R.* v. *Treacey*[89] the incapacity of the prisoner resulting from self-administration of aspirin was regarded by the court as creating a further element of impropriety in the questioning which occurred. Persons who need treatment in hospital as a result of events preceding or accompanying arrest are not charged until they have recovered and *R.* v. *Treacey* indicates the correctness of the practice.[90]

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[85] *R.* v. *Powell-Mantle* [1959] Crim.L.R. 445.

[86] (1905) 20 Cox 711.

[87] *R.* v. *Spilsbury* (1836) 7 C. & P. 187; quoted: Phipson, *Evidence*, 9th ed., p. 268; Roscoe, *Criminal Evidence*, 16th ed., p. 47; Wills, *Evidence*, 3rd ed., p. 312; Kenny, *Criminal Law*, 17th ed., p. 495. In *Spilsbury* there was a suspicion that a constable had induced drunkenness for the purpose of extracting information from the prisoner, then in his custody. The decision has been followed in South Africa: *R.* v. *Rimmer* [1954] Crim. L.R. 864.

[88] *Cf.* Cross, *Evidence*, p. 439, note 13; and *Manual of Military Law*, 1956, Part I, Chap. IV, para. 87.

[89] *Supra,* p. 313.

It is assumed to be the rule that evidence obtained by a trick is admissible.[91] Thus in *R.* v. *Burley* [92] the police told the prisoner falsely that some of his accomplices were in custody and so obtained a confession. There is no reference to a discretion to exclude in the authorities. In *R.* v. *Histed* [93] however a confrontation between the prisoner and a material witness and the question "Do you know this gentleman?" by a police officer was condemned as a form of entrapping the prisoner into making admissions. And in the judgment in *R.* v. *Voisin* [94] there is a proviso which indicates perhaps that anything in the nature of a "trap" or "manufacture" of evidence might result in inadmissibility and not merely provide a ground for exercising a discretion to exclude. In *R.* v. *Gardner and Hancox* [95] evidence of a conversation overheard by the police between the prisoners in adjoining cells was admitted although it was suggested that the police had deliberately arranged this. It may be suggested that the authorities are ambiguous enough, veering as they do between condemnation and apparent indifference, to justify the suggestion that there should be a discretion to exclude evidence obtained by means of a trick.[96] In any case the weight of such evidence will be subject for judicial comment.

One form of unfair practice—the confrontation of prisoners with a view to causing one to react to a statement by the other or simply to his presence—has been considered to justify the exercise of a discretion to exclude. Rule 8 covers the communicating of statements of co-prisoners to other prisoners by the police but does not refer to the case where there is simply a confrontation with a view to obtaining a confession or admission from the prisoners. However, this was considered contrary to the Judges' Rules, *obiter*, in *R.* v. *Pilley*,[97] perhaps on the ground that this was a form of cross-examination, although this is not stated.

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[90] See the *Podola* trial, sixth day, *The Times*, September 18, 1959. Podola was arrested on July 16 and charged just before leaving hospital on July 20. He was then taken to Chelsea police station and formally charged.

[91] Phipson, *op. cit.*, p. 268; Roscoe, *op. cit.*, p. 47; Archbold, 34th ed., § 1113; *R.* v. *Firth* (1913) 8 Cr.App.R. 164, *per* Avory J.

[92] (1818) 2 Stark., *Ev.*, 3rd ed., p. 13 note. See also *R.* v. *Derrington* (1826) 2 C. & P. 418 (turnkey promising to post prisoner's letter and detaining it).

[93] (1898) 19 Cox C.C. 16. Hawkins J., Lewes Assizes.

[94] *Supra*, p. 306. The context of the remarks seems to be the issue of admissibility.

[95] (1915) 11 Cr.App.R. 265.

[96] *Cf.* Cross, *op. cit.*, p. 440: and the *Manual of Military Law*, 1956, Part I, Chap. IV, para. 87.

Presumably if a person in the custody of the police as a result of a mistake as to identity [98] incriminates himself in respect of some offence other than the one for which he is in custody the discretion to exclude should be operative if the principles of the Judges' Rules have been ignored.

One of the developments in the cases under review has embarrassing results. In *R.* v. *Winkel* [99] it was said that to say to a suspect "It is alleged you gave her £5" was a form of cross-examination. It was further said that it was objectionable on the same ground to explain the charge in the following terms:

> "You have been brought here and will be charged with procuring abortion on Beatrice Gregg. She alleges you are responsible for her condition, and you gave her £5 to get the operation done."

Yet these words might be said to constitute merely an attempt to inform the prisoner of the charge in non-technical language and to indicate the general circumstances in which the charge is brought. In *Christie* v. *Leachinsky* [1] this was stated by Viscount Simon to be a duty incumbent on police officers. This places the police in a difficult position. It is possible that *R.* v. *Winkel* goes too far in this respect and that what is important is for the court to detect any invitation or provocation to make a statement. It is obviously proper to ask in general terms if the prisoner has anything to say in answer to the charge, hence the terms of the police caution in Rule 5 of the Judges' Rules.

Finally there is an important class of case not covered by the Judges' Rules. In cases of larceny and other offences of a similar degree of gravity the police do not arrest but proceed by summons. The Rules relate to custody and charging in the normal way and yet it must be desirable at least that a caution be administered to a person who is to be proceeded against by means of a summons for a fairly serious offence, *i.e.*, the analogy is with Rule 2.

Conclusions

It is not intended to summarise what has gone before but to emphasise the most significant aspects of the subject.

1. It cannot be stated too often that the Judges' Rules are primarily for the guidance of the police and only incidentally of relevance to the exclusion of evidence by the courts.

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[97] (1922) 16 Cr.App.R. 138.

[98] *Cf. Fisher* v. *Oldham Corporation* [1930] 2 K.B. 364.

[99] *Supra*, p. 315.

[1] [1947] A.C. 573, at p. 587 (H.L.).

2. The view of the law now accepted is the rule generally understood to have been laid down in *R.* v. *Voisin*, *viz.*, that there is a discretion to exclude evidence obtained in breach of the Rules.

3. The exercise of this discretion is in no way tied to breach of the Rules and evidence may be excluded when technically there has been no infringement of them.

4. Rule 3 must be read in conjunction with the Home Office Circular of 1930 and the case law as a whole. Any form of cross-examination of persons in custody by the police is prohibited although Rule 7 and the circular refer to some exceptions to the general rule.[2]

5. There is no very clear division of function between Rules 2 and 3 and some authoritative clarification or amendment of the Rules would be welcome.

6. Some further consideration should be given to the concept of custody since experience has shown that it is far from being self-evident. In particular the principles applicable to police questioning and police procedure as it is at present should be carefully related to the decision in *Christie* v. *Leachinsky* and the general assumptions as to the policy of the law made by the House of Lords. " Non-specific " custody such as detention for questioning is clearly incompatible with *Christie* v. *Leachinsky*. It should be made very clear that from the point of view of the citizen and of the House of Lords custody is arrest.

7. There is a divergence between the policy of the law on questions in custody and police practice in the matter of questioning on offences other than that for which the prisoner is in custody. On this also some authoritative guidance would seem to be necessary.

8. There might be more coherence in judicial attitudes to police practices. Admittedly the flexibility inherent in assuming a discretion to exclude is probably the most sensible approach. On the other hand the courts refer variously to considerations of " unfairness," a dislike of self-incrimination and the unreliability as evidence of unguarded statements. In some cases the exercise of the discretion is merely the result of a general impression that some form of pressure has in fact occurred.[3]

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[2] *R.* v. *Booker* (1924) 18 Cr.App.R. 47 is wrong on this point.

[3] See on the questions of principle involved: Cowen and Carter, *Essays in the Law of Evidence*, pp. 41 *et seq.*; Gottlieb, 72 *Law Quarterly Review* (1956) pp. 224–226.

Questioning by the Police: Some Practical Considerations

By GLANVILLE WILLIAMS, LL.D., *Barrister-at-Law*

There is a wide divergence between the standards of behaviour laid down in the Judges' Rules (and other judicial statements) and the actual conduct of the police. The police make a practice of questioning suspects without formal arrest, and even persons in custody.

Questioning upon invitation

Serjeant Sullivan, a leading member of the English Bar of Irish origin, drew attention in his autobiography [1] to an odd difference of national character. " The Englishman," he said, " is brought up as one subject to authority. If a police officer comes to an Englishman and says: ' Kindly accompany me to the police station ; I wish to ask you some questions,' the Saxon meekly goes to the police station and submits for many hours to interrogation. If an Irish constable had said to a man, ' Come with me to the barrack,' the man would have replied, ' Show me your warrant.' If there were not a warrant, to the barrack the man would not go unless he were arrested. If there were no warrant or even a charge against a man, he would not be interrogated. Statements, therefore, were truly voluntary in so far as they were given by persons who were, unlike the English people, fully conscious of their right to refuse them."

The traditional attitude of the English lawyer towards such questioning in police stations is one of hostility. But it would be unwise to lose sight of the practical necessities of law enforcement, and it would be legally unsound to blur the distinction between voluntary attendance at a police station and a false imprisonment.

When the police wish to interview a suspect, they may do so at his house, or they may invite him to go to the police station. A suspect usually thinks it discreet to go to the police station upon request, partly because he does not want the neighbours to know, and partly because he is in a dangerous situation and wishes to try to satisfy the police that he was not implicated. It may be doubted whether the true reason for compliance is, as Serjeant Sullivan suggests, ignorance of the right to refuse.

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[1] *The Last Serjeant* (London, 1952), 110.

The distinction between command and request

There are some decisions suggesting that every invitation to go to a police station results in a false imprisonment unless the party volunteered to go in the first instance,[2] but it is submitted that this goes too far. When both parties to the affair do not intend an arrest to take place, it would be undesirable to have a rule of law " deeming " that there is a false imprisonment. It sometimes happens that the police leave a note at the house of a suspect, asking him to attend at the police station because it is thought that he may be able to help them with their inquiries into a specified matter. Such a written request cannot be construed as carrying an implied threat of immediate force if the request be not complied with. Even where the request is conveyed by word of mouth, it would be a strong thing in many circumstances to regard it as equivalent to a command. An ordinary witness may sometimes be invited to attend at the police station to give evidence, and this invitation when accepted obviously cannot amount to a false imprisonment by the police. The argument that there is an imprisonment is stronger when the request is addressed to the suspect. Yet the suspect may not know at that moment how strong the suspicion is against him; and the police may not have made up their minds to arrest him. To interrogate a suspect by arrangement at the police station is often kinder than an official visit to his home, because the latter may be harmful to his reputation. The suspect may well feel that, if he has to visit the police station, he would rather go there " voluntarily " to assist the police in their inquiries than under technical arrest. One good reason why the suspect wishes to postpone arrest as long as possible is that he fears that this will irrevocably set the wheels of justice turning: he hopes to satisfy the police of his innocence and remain a free man. Again, a newspaper report of the suspect's being arrested is more damaging to him than a report that he has visited the police station. Also, the law creating the offence of escape comes into operation only if there has been a technical arrest; and for this reason, if for no other, the courts should be slow to find that there is an arrest unless the suspect has clearly been told that he is under arrest.

On all these accounts, it seems clearly necessary to maintain the distinction between a command which results in an imprisonment and a request which does not, and to hold that there can be no imprisonment in the absence of words or conduct by the arrester intimating that the suspect is under arrest or that force will be used if he fails to comply with the invitation.

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[2] *Peters* v. *Stanway* (1835) 6 C. & P. 737; *Conn* v. *David Spencer, Ltd.* [1930] 1 D.L.R. 805.

The best course for the suspect, if he is " invited " to accompany the officer to the police station and if he wishes to decline the invitation, is to ask point-blank: " Is this an arrest? " If the answer is in the affirmative, he will then have his action for false imprisonment if he complies and the arrest is illegal. If the answer is in the negative, he can refuse the invitation and will not be guilty of obstructing the police. If he does not ask the question, but prefers to leave the situation ambiguous, there seems to be no sufficient justification for treating the case as one of arrest. In this respect I should like to withdraw an opinion previously expressed in this *Review*.[3]

When a suspect attends voluntarily for questioning, the questioning is proper under the Judges' Rules until the moment when the police have decided to make a charge. Since it is for the police alone to determine the point of time at which they wish to make a charge, the rule is inherently difficult to enforce. Where the evidence so far obtained by the police is enough for making a charge but doubtfully enough for conviction, the rule against further questioning requires a degree of self-restraint on their part which it is almost unreasonable to look for. Almost inevitably, the police will continue their questioning until they have not merely sufficient evidence for making an arrest, but sufficient evidence for securing a conviction. If they are afterwards challenged, it will be fairly easy to assert that they had still not finally decided to make a charge.

Questioning persons in custody

Sometimes the police will even question a suspect who has been compulsorily detained or formally arrested. This is not allowed by the Rules laid down by the judges, but these Rules lack an effective sanction.

For one thing, it is often easy for the police, if they are prepared to lie, to deny that interrogation took place. Indeed, such denials can almost be said to be standard police practice. The denials may sometimes be true, but it is difficult to dispel the impression that sometimes they are not. The subject is delicately treated by Lord Justice Devlin in his recent study of *The Criminal Prosecution in England*, his purpose being partly to point out that the police are entitled to ask questions for the purpose of removing ambiguities in the accused's statement, and therefore act inadvisedly when they afterwards deny asking such questions.

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[3] [1954] Crim.L.R. 14.

A second reason why the Judges' Rules operate imperfectly is that judges at the present time tend to wink at breaches of the Rules, at any rate if the charge is a serious one. Of this more later.

Thirdly, it would not operate as a substantial check on police questioning even if the judges made a firm practice of excluding all evidence of confessions obtained by this means. For the practice of questioning would still offer substantial advantages to the police in the enforcement of the law. By obtaining a confession, the police will probably be able to persuade the culprit to plead guilty, thus avoiding a trial. Even if he does not plead guilty, the confession may well give the police "leads" to further evidence, such as the names of accomplices or the place where the loot is hidden; and this evidence is likely to be of use at the trial even though the confession itself is excluded. Thus it is unrealistic to suppose that the police will cease from questioning accused persons merely because they cannot make direct use of confessions so obtained.

Detention for questioning

Some evidence will now be given of the practices of detention and questioning on the part of the police. No study has been made of their precise extent. We do not know how many persons in any one year are taken to the police station for questioning; how often the legal requirements of a valid arrest are satisfied; how long suspects are detained without charge; how much questioning takes place late at night; how many are released without being charged. We do not know the conditions of the questioning, or what blandishments, threats or trickery may sometimes be used to get the required answers. But if the reader will be satisfied with unquantified assertions and isolated examples, they can be supplied.

The Royal Commission on Police Powers, in its report of 1929, stated: "We have received a volume of responsible evidence which it is impossible to ignore suggesting that a number of the voluntary statements now tendered in court are not 'voluntary' in the strict sense of the word"—*i.e.*, are elicited by police interrogation. The Commission recommended that any person who is in fact under restraint and knows that he is under restraint should be treated as being in legal custody for all purposes, and therefore should not be subject to questioning.[4]

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[4] It is to be noted that the Royal Commission was appointed as a result of the *Savage* case: see the report of the committee of inquiry on this case, Cmd. 3147 of 1928. For other reports of questioning by the police

Notwithstanding this recommendation, the practice of questioning persons under detention continued. Sir Travers Humphreys stated that he had observed during his lifetime as barrister and judge a great increase in the number of confessions made to policemen, resulting in pleas of guilty.[5] That the police still detain for questioning without making an arrest is illustrated by an incident related by Mr. G. H. Hatherill in an address to the Royal Empire Society.[6] Since Mr. Hatherill bore the impressive title "Commander (Crime)" at Scotland Yard, and told the story with some pride as an example of police practices, it may be taken as a confession by the police of what they do. Early on Christmas Day, 1944, a young woman was found murdered at Dagenham. Mr. Hatherill sent out his detectives to bring in to the police station the dead girl's young men—six or seven—with orders not to tell them why they were to go there but to note their behaviour. "Having all been torn away from their Christmas dinners, all but one of them wanted to pull down the police station. The odd man raised no difficulties, and when asked to get into the car said: 'I shall have a ride, anyway,' He eventually confessed to the murder."

Action of this type could be accounted efficient and proper police work if each suspect were given to understand that he was accompanying the police freely. However, it was doubtless part of the ruse in this instance, as in sundry others, to give each suspect the impression that he was under compulsion, in order to frighten him into confessing if he were the real culprit. Such action undoubtedly constitutes a false imprisonment.

Sir Ronald Howe, who was formerly a Deputy Commissioner at Scotland Yard, wrote that "the Judges' Rules are so much a part of the detective's training that it is a very rare thing for him to disregard them." But Sir Ronald had just stated his opinion that according to the Rules "a man taken into custody may not be questioned at all until [a] caution has been administered."[7] This is the wording of Rule 3, but it has long been known to contain a misleading implication. According to the interpretation of Rule 3 adopted by the judges in 1930 and circulated by the Home Secretary in the same year, "Rule 3 was never intended to encourage or authorise the questioning or cross-examination of a person in custody after he has been cautioned, on the subject of the crime for which he is in custody, and long before this Rule was formulated,

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belonging to the same period see H. R. G. Greaves, *Reactionary England* (London, 1936) 17–19; *The Reform of the Law* (ed. Glanville Williams, London, 1951) 184–186.

[5] [1956] Crim.L.R. 300.

[6] *The Times*, February 19, 1954.

[7] See Sir Ronald Howe's article in *John Bull*, March 8, 1958.

and since, it has been the practice of the judge not to allow any answer to a question so improperly put to be given in evidence."

Later in his article, the author gave details of the methods used by the police in questioning those whom they had "pulled in" on suspicion of crime. They will give the suspect a nice, strong cup of tea with plenty of sugar in it, express sympathy for his plight, and try by every means to get his confidence. "Most suspects, especially those new to the game or being questioned about a serious crime like murder, are only too eager to confide in somebody, and if the questioning policeman shows himself a decent chap, anxious to be fair, he will quite often be the confidant." It seems evident from the reference to the "questioning policeman" that the Home Secretary's circular of 1930 is regarded as a dead letter.

The way in which the police behave when they think the circumstances require it is illustrated by the case of Rowland in 1946. Rowland was suspected of murder, and was awakened at 11 p.m. by two police officers who told him to get up and dress. He was told that an inspector wanted to see him at the police station. He was taken to the police station and arrived there at 11.30 p.m. According to the evidence of the police themselves, he was questioned for two hours, and then had his statement taken down and signed, which took forty minutes; this would have meant that Rowland got to bed, in the police station, at ten minutes past two in the morning. Only after he had made his statement was he charged with anything. According to Rowland's own evidence, the period of questioning was substantially longer.[8]

There can be no doubt that this action by the police was illegal. English law knows no "detention for questioning" short of arrest, and the act of taking Rowland to the police station without his consent was an illegal arrest because the reason for it was not stated at the time. It is surprising that, when Rowland was put on trial, his statement made in answer to the improper questioning was admitted in evidence without comment from the presiding judge or even protest from his own counsel.

In a case of 1953, a deaf mute was taken to the police station and kept there under interrogation for over three days on suspicion of murder. No charge was made against him during that time, but he was afterwards charged and acquitted.[9] In a case of 1957, the police admitted that they had interrogated a suspect in the charge room and attempted to obtain a confession by falsely stating that they possessed evidence against him. The bluff failed, and the accused was acquitted, the judge severely commenting upon the conduct of the police.[10] In 1958, *The Times* reported that two youths were kept at a police station for more than twenty-four hours, while they were being questioned by detectives investigating the death of a constable.[11] Two other cases of police questioning achieved prominence in the same year. A woman whose intelligence was below average and who was suffering mentally from the effects of childbirth was accused of murdering her baby. She confessed to the charge after a long series of leading questions by a police sergeant, which the judge described as " bullying " and as involving the use of suggestion ; the confession was excluded from evidence and the woman was acquitted. A young nurse was convicted of theft ; her confession made to the police, after " hard questioning " on three separate visits to the police station, was admitted in evidence ; but after her conviction it was found that no theft had been committed. On this, the comment of the chief superintendent of Lancaster's police was: " This matter has been investigated, and the girl was not treated any differently from any other prisoner." [12]

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[8] Paget and Silverman, *Hanged and Innocent?* (London, 1953) 47–48.

[9] *Roberts, The Times,* March 25, 1953.

Again in 1959, when the police were investigating the murder of a West Indian, two young men were detained for questioning without charge for nearly two days, before they were allowed to go home.[13] *The Times* of February 11 last reported that a man was taken under police escort from Warrington to Birmingham and questioned all day by detectives who were investigating a murder. But the word " escort " is perhaps ambiguous.

The attitude of the judges

These instances, reported in the Press, indicate that detention for questioning, and questioning after arrest, are still practised by some police forces, without serious check. To add to the anomaly, it seems from reported cases that the judges have given up enforcing their own rules, for it is no longer the practice to exclude evidence obtained by questioning in custody. In 1930, when the judges' opinions were reported in the Home Secretary's circular, it was broadly true that the custom of the judges was not to allow any answer to questions addressed to a person in custody to be given in evidence. Earlier, in *Voisin*,[13a] the Court of Criminal Appeal had laid it down as a general principle that the confession was admissible though obtained as a result of questioning in custody; but a judge might exclude it in the particular case on grounds of unfairness. Thereafter the judicial attitude toughened, and between the wars the general practice was to exclude the confession; but since about 1950 they have almost uniformly been admitted.[13b]

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[10] *The Times,* May 18, 1957 (Cassels J.).

[11] *The Times,* December 18, 1958.

[12] For the last two cases see *The Economist,* August 2, 1958 ; [1958] Crim. L.R. 565.

[13] *The Economist,* May 23, 1959.

Our toleration of this situation raises serious doubts of our bona fides in prohibiting police interrogation of persons seriously suspected of crime. Thurman Arnold showed, in a penetrating and amusing study, that the criminal process embodies conflicting values, and he concluded that "the public administration of criminal justice is not a method of controlling crime. It is rather one of those problems which must be faced by those who desire to control crime."[14] So likewise with the ban on interrogation by the police. A traditional principle of "fairness" to criminals, which has quite possibly lost some of the reason for its existence, is maintained in words while it is disregarded in fact. When judges both assert that the police should discipline themselves, and yet admit evidence that has been obtained through disregard of the judicially-imposed discipline, the stultification of our professions becomes patent.

Arguments in favour of allowing the police to detain for questioning

The reader may be expecting at this point a vigorous denunciation of the police and of the judges, and a plea for a return to the Judges' Rules as interpreted in 1930. What has to be considered, however, is whether these Rules are a workable part of the machinery of justice. Perhaps the truth is that the Rules have been abandoned, by tacit consent, just because they are an unreasonable restriction upon the activities of the police in bringing criminals to book.

Take the facts in *Voisin*, one of the first cases after the formulation of the Judges' Rules, where the Rules were in effect ignored by both the police and the judges. The accused had been detained for questioning by the police on suspicion of murder, but the police had not at that time decided to charge him with the crime. (Indeed, others were detained on the same suspicion, though subsequently released.) As part of the questioning, the police asked the accused if he would have any objection to writing down the two words " Bloody Belgian." He replied, " Not at all," and then wrote down " Bladie Belgiam." These words were his death-warrant, for the body of the murdered woman had had a label attached to it with the two words spelt in the same way as the accused now spelt them. The trial judge admitted the evidence, notwithstanding that the accused had not been cautioned and was in custody at the time; and the Court of Criminal Appeal affirmed the conviction.

[13a] [1918] 1 K.B. 531.

[13b] See *May* (1952) 36 Cr.App.R. 91; *Wattam* (1952) 36 Cr.App.R. 72; *Bass* [1953] 1 Q.B. 680; *Joyce* [1957] 1 W.L.R. 140; and *cf. Mills* [1947] K.B. 297.

[14] *The Symbols of Government* (New Haven, 1935), Chap. 6.

From every point of view except the legal one, the action of the police in this case was perfectly proper. It is true that a number of innocent persons were subjected to the inconvenience of detention in the police station for questioning, but this was surely a lesser evil than that a dangerous murderer should be left at large in society. The request addressed to Voisin was not likely to entrap an innocent man; on the contrary, it gave the accused an opportunity of convincing the police of his innocence, if he were innocent, for then his handwriting and spelling would have been different from the writing on the label.

In the same way, the action of the police in the case related by Mr. Hatherill was socially justified. It may be, in retrospect, a source of mortification that one has missed one's Christmas dinner, and an even greater misfortune that six men should have missed their Christmas dinners. But the evil is infinitely less than that a murderer should go free.

This same incident seems to show the need for some power of detention for evidentiary purposes on reasonable suspicion, distinct from the power of arrest. It is true that, in many cases, the police are able to act effectively without powers of detention. They may interrogate a suspect in his house, with his reluctant consent, or they may prevail upon him to attend for questioning in the police station. But these methods are not always adequate. A common method of solving crime is to use the *modus operandi* index and compile a list of all criminals who are known to use the methods employed in committing the crime under investigation; the list is then narrowed by excluding all those who for one reason or another could not have been responsible—as where they do not correspond with the description given by witnesses, or can produce a satisfactory alibi. The process frequently leaves a number of suspects. A witness may be shown photographs of these suspects, and he may pick out one, who is then put in an identification parade; if he is identified as the criminal, there may be sufficient evidence to charge him. Suppose, however, that the witness cannot make up his mind between two photographs? The police may wish to bring in the two suspects to stand in identification parades, but it seems clear that the law of arrest is unsuitable to achieve this end. An arrest supposes that a charge is made and that the accused will be brought before a magistrate as the first step in legal proceedings. But it would be improper to bring a man before a magistrate merely with the evidence that either he or someone else committed the crime. The machinery of arrest is inappropriate until suspicion has been focused on a single person.

It may be conceded that hardship may be caused to persons who have previously been convicted of crime if they are subject to detention and police interrogation merely because someone else has committed a crime by a similar method. A former criminal who is now trying to lead an honest life may have his new career gravely jeopardised by such action on the part of the police. Thus a power of detention for questioning would certainly need to be used with wisdom and restraint. But this is not necessarily a reason for withholding the power from the police altogether. It should, of course, be limited to crimes of some gravity, and also subject to a limit of duration, and other safeguards to be suggested presently.

The reliability of confessions

Some comments may be made on the reliability of statements made in answer to questions by the police. Sometimes, as in *Voisin*, the reply is obviously authentic, because it consists not in a mere statement but in a demonstration of how the accused person writes and spells. More doubt may be felt with statements admitting the crime. The police are remarkably successful in obtaining incriminating statements by means of interrogation, and this very success naturally awakens dark suspicions. But it is certainly not necessary to suppose that unfair methods have been used. When an offender has been caught in incriminating circumstances, he often judges it better to confess and plead guilty, hoping thereby to get a lighter sentence. Moreover (and this is a fact too little understood by those who express alarm when confessions are made to the police), a guilty person who finds himself detected often wishes to confess in order to obtain relief from the feeling of guilt. The point cannot be better expressed than in the words of Wigmore.

"The nervous pressure of guilt is enormous; the load of the deed done is heavy; the fear of detection fills the consciousness; and when detection comes, the pressure is relieved; and the deep sense of relief makes confession a satisfaction. At that moment, he will tell all, and tell it truly. To forbid soliciting him, to seek to prevent this relief, is to fly in the face of human nature. It is natural, and should be lawful, to take his confession at that moment—the best one. And this expedient, if sanctioned, saves the state a delay and expense in convicting him after he has reacted from his first sensations, has yielded to his friends' solicitations, and comes under the sway of the natural human instinct to struggle to save himself by the aid of all technicalities." [15]

On other occasions, when the offender wishes to make a statement that he thinks will help his case, he may not realise that some of the facts in the statement tell against him. They may either reveal to the police facts that they did not know before, or else contain palpable untruths which will be used against the accused in cross-examination. In one way or another the statement will help to work his downfall.

Many statements are made by accomplices against each other. When several are arrested, each fears that the other is shielding himself at the expense of his companions. Thus each makes a statement to the police, throwing the blame on the others; and the conflicting stories disclose facts previously unknown to the police. Eventually the police are able to piece together the truth.

It certainly looks odd when a suspect against whom there is no convincing evidence confesses to a serious crime under interrogation. Sometimes this may be because the offence has been weighing on him, and he finds it a relief to confess. But on other occasions methods of debatable propriety may have been used to produce the confession. One method is to build up a state of tension, in which the suspect is placed in custody but left severely to himself, and then suddenly to break the tension by offering him friendship or solace with a suggestion that he will feel better if he comes clean. Or the prisoner may be confronted with some damning piece of evidence which suggests to him that the police know all. Such methods have been successful in producing true confessions; unhappily they have also produced false ones.

To the ordinary person it must seem baffling why a man, apparently of sound mind and understanding, should, when under suspicion of a serious crime, make to the police a full and circumstantial confession of the crime when in fact he never did it. Occasionally there may be understandable motives, as to shield a lover, but in other cases there seem on the surface to be none. The reason may sometimes be found in the very efficiency of the police methods of obtaining confessions. There are perhaps persons of such mentality and temperament that in order to end an atmosphere of suspicion and hostility they will say and sign anything that seems to produce for the moment a more favourable feeling. This may be the explanation of the confession by Evans of the murder of his wife and child, a confession which in the light of the subsequent conviction of Christie is so difficult to accept.[16] Some people seem to be so suggestible that they can themselves be falsely persuaded of their guilt.

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[15] *Evidence,* 3rd ed., iii, § 851.

Notwithstanding the danger of a false confession, this can hardly be regarded as a general reason for refusing to receive evidence of confessions given to the police. A confession given to the police as a result of ordinary questioning is likely to be true. The veracity of the confession would normally be a matter for consideration by the court of trial; there would be no sufficient reason to exclude it altogether. We do not normally exclude evidence from the consideration of a court merely because of the bare possibility that it is untrue. Important as it is not to convict the innocent, we cannot draw up the rules of procedure and evidence *merely* for the purpose of acquitting the innocent. Some slight risk of convicting the innocent in rare and extraordinary cases must be accepted for the purpose of convicting the mass of those who are guilty. Moreover, the risk that false confessions may be obtained by the unfair use of suggestion might perhaps be diminished if a mechanical recording were made of the questions and answers.

The ethics of interrogation

There remains an ethical question of some difficulty whether the police are justified in obtaining a confession by trickery. Some kinds of trickery for the purpose of trapping criminals are certainly regarded as permissible. Thus the police may arrange that a blackmailer interviews his victim while they are concealed in a cupboard, or they may catch a thief by leaving marked money for him to take, or may round up a gang with the help of undercover agents. In *Gardner*[16a] the police placed two persons who were accused of the same offence in adjoining cells, and listened to their conversation through a communicating opening: evidence of what the two said was allowed.

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[16] See Paget and Silverman, *Hanged—and Innocent?* (London, 1953) 174. The Home Secretary of the time, Mr. Ede, indicated in a speech in the House of Commons on February 11, 1955, that he had come to accept the view that the conviction of Evans was a mistake.

[16a] (1915) 11 Cr.App.R. 265.

The question is, then, whether it is proper for the police to use deception in order to obtain a confession. The cup of tea and expression of sympathy are really vehicles of deception, for an officer who is trying to obtain a confession for the purpose of facilitating a conviction of crime is hardly the friend of the suspect that he professes to be. But it would be a rather tender conscience that would object to such blandishments; they are, at least, very far removed in reprehensibility from bullying and violence.

The Americans, with their pressing problem of violent crime, have felt obliged to go much further in the use of techniques to obtain confessions. In the United States there are no Judges' Rules, and questioning by the police of persons lawfully in custody is regarded as proper. It has, indeed, been converted into something of a fine art. The second part of Inbau and Reid's *Lie Detection and Criminal Interrogation* contains a remarkable series of suggestions to the police or State Attorney for securing confessions by interrogation. Among other things, the interrogator is advised to wear civilian clothes, and to make expressions of friendship for, and on occasion to flatter, the suspect. He may sympathise with the suspect by telling him that anyone else in similar circumstances would have done the same, and he may reduce the offender's guilt feeling by minimising the moral seriousness of the offence, condemning the victim or the accomplice, or putting into the offender's mouth defences which the interrogator knows will not eventually be of any avail in court. The interrogator may pretend confidence in the guilt of the suspect which he does not feel; he may falsely tell the suspect that an accomplice has confessed; and he may indulge in "play-acting" with a fellow officer, one pretending to be friendly to the accused while the other is unfriendly; the "friendly" one is then left alone with the accused in order to prompt the confession.

An Englishman's reaction to these procedures is generally squeamish; the American lawyer's tougher reaction is: "Why not?" It is, in truth, difficult to resist the argument that it is better that a serious criminal be convicted by such means than that he should remain at large to commit similar crimes. On the other hand, it is important to consider whether the adoption of tactics that contravene ordinary standards of honest dealing may not harm the police in the eyes of the public and cause a loss of confidence. In the United States, one of the chief problems confronting the police is that the public (with some reason) has no trust in them and will not co-operate by giving information of crime.

One of the procedures used by the French police in order to put psychological pressure on the accused is to compel him to take part in a " reconstruction " of the crime. Without going so far as this, the American police frequently take the accused to the scene of a crime of violence, partly to get a more dramatic identification from any eye-witness and partly in the hope of inducing a confession. In January of this year, what the newspapers called " one of New York's most brutal rape-murders " was solved when a young man of twenty-two was arrested on a charge of burglary, and then suspected of the murder in question owing to a similarity in the mode of entry on the two occasions. He was twice taken to the bedroom where the crime had been committed, and was unable to keep his eyes away from a picture of the Madonna hanging over the bed. On the second visit he broke down and confessed.[17] Such a procedure would be regarded as highly improper on the part of the English police, yet its effectiveness for producing confessions can hardly be denied.

Other considerations of policy

English lawyers tend to regard it as axiomatic that the police should not interrogate persons in custody, and they rarely inquire into the reason for the prohibition. Historically, it seems to have owed its origin to the indignation caused by judicial inquisition in political cases.

The King's Council of the seventeenth century provided a striking parallel with the secret police of modern tyrannies. It had its spies in every locality; it arrested and imprisoned persons on the slightest suspicion; and it issued orders to justices of the peace who interrogated suspects under torture.[18] These excesses of governmental power burnt into the racial memory of the English. It was by way of reaction against them, as well as against the general severity of the criminal law, that the opinion came to be accepted in the early years of the nineteenth century that a magistrate should not interrogate an accused person. In 1848, this self-restraint was translated into law.

During the course of the nineteenth century, judges assumed that what was forbidden to the magistrate as a judicial officer was also forbidden to the police, and occasionally they excluded evidence obtained by the questioning of suspects in custody. But there is no compulsion about this logic, for the considerations of policy are different. It may be indecorous for a judge to question an accused person, and it may offend our sense of fairness to send an accused person to prison for refusing to answer incriminating questions; but neither of these issues is involved in questioning by the police. In any case, it is probably true to say that our reluctance to question accused persons misinterprets the lessons of history. As Sir James Stephen wrote, over a hundred years ago, " this opinion arose from a peculiar and accidental state of things which has long since passed away, and our modern law is in fact derived from somewhat questionable sources though it may no doubt be defended." [19]

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[17] *New York Journal-American*, January 28, 1950.

[18] Nicholas, *Proceedings and Ordinances of the Privy Council* (1837) vii, pp. x/vi–x/vii, 129.

The rule against police questioning cannot be explained by saying that such questioning may result in untrue confessions, for it can sometimes be demonstrated that the confession is true. Where the confession discloses details of the crime which only the criminal could have known, its authenticity is beyond doubt; yet some judges have excluded such a confession if it was the result of questioning by the police.

A possible argument against the questioning of prisoners is that the possession of this power tempts the police to do their job in an unsatisfactory way. One of the remarkable features of police practice in England, which impresses Continental observers, is the short space of time that is allowed to elapse between the arrest of an offender and his appearance in court and subsequent trial. Whereas, in many European countries, a defendant may languish in prison for as much as a year without trial,[20] this would be unheard of in England. The reason sometimes suggested is that the English police generally build up their evidence before making the arrest, so that very shortly after making the arrest they are ready with their evidence in court. On the Continent, the tendency is to arrest the suspect as the first step, in order to interrogate him; and the interrogation may be continued for weeks or months. Nevertheless, the abuses of Continental procedure are not a necessary element in police questioning. Under the English practice, the police only have a few hours in which to question the arrested suspect before bringing him before a magistrate. Even if the principle were conceded that the police may properly question a person in custody, a short time-limit would obviously be placed upon such questioning in order to avoid prolonged detention without trial.

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[19] (1858) 1 Juridical Society's Papers 459.

[20] See, for France and Belgium, the instances given by Ensor, *Courts and Judges* (Oxford, 1933) 35; Denning, *Freedom under the Law* (London, 1949) 10. Dr. Otto John was kept in custody in West Germany for nearly eleven months before the opening of his trial on November 12, 1956. These prolonged detentions are especially significant when combined with police interrogation. Cardinal Mindszenty, who was tried before the People's Court in Budapest in 1949, put in a formal plea which stated that he had been interrogated in custody and in court for 40 days. Pastor Dinov, who was eventually acquitted by a People's Court in Sofia in 1949, was questioned for two months in prison, sometimes by a single questioner, sometimes by teams. Torture is not necessary to procure confessions if unlimited and practically unceasing questioning is permitted, for no ordinary person can stand it, especially when the prisoner has his resistance lowered by lack of warmth, lack of food, and lack of sleep, and is compelled to remain standing during the questioning. Mr. Stypulkowski, who wrote his experiences in his book *Invitation to Moscow* (London, 1951), had to endure 141 examinations, of which some lasted for 14 hours at a time. See also F. Beck and W. Godin, *Russian Purge and the Extraction of Confession* (London, 1951).

Perhaps the real reason why we are afraid to allow the police to question persons accused of crime is that we fear the very efficiency of the proceeding. Few criminals can remain completely silent under persistent questioning; and if they answer, they are likely to give themselves away, if only by making statements which can be disproved, or statements which are inconsistent with a defence afterwards set up for them at the trial. A considerable number will confess. Sir Patrick Devlin in his Sherrill Lectures pointed to the remarkable proportion of confessions among those convicted of homosexuality between consenting adults—94 per cent. —where apart from the confession it would often have been extremely difficult to convict. He pointed out that in Scotland, where the judges are more active in preventing police questioning, only one person out of nine convicted of homosexuality made a written admission.[21] One may well feel that the practice of prosecuting homosexual acts between adults is mistaken, but that has nothing to do with the general question whether the police should be allowed to use efficient methods for enforcing the law.

A strict ban on interrogating persons in custody would place a strain upon the self-restraint of the police. The duty of the police is to detect criminals, and they are generally allowed to address questions to every quarter where they hope to obtain information. It may seem strange that they should be supposed not to ask questions of the one person who is central to the whole investigation. To tie the hands of the police on a " sporting theory of justice " has a debilitating effect upon morale. As Sir Ronald Howe has said, " it is essential to effective police action that the police should be convinced that, when they have spent many hard days and nights tracking a suspect down, he should be properly dealt with." This consideration would seem to suggest a modification of the Judges' Rules, or of their interpretation, to allow some questioning in custody.

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[21] *The Criminal Prosecution in England* (London, 1959) pp. 48–49.

It must also be remembered that when the preliminary inquiry comes to be held, the prosecution will be forced to come out into the open with the details of its case against the accused. This is as it should be, for it would not be right for the accused to be taken by surprise at the trial. Yet there is no apparent unfairness in trying to obtain certain information from the accused before the preliminary inquiry, while he is still in the dark about the details of the prosecution's case. After the inquiry, the accused will be able to adjust his tale to fit the known facts.

For these important reasons, a complete prohibition of the questioning of those who are strongly suspected is difficult to enforce against the police, and, if it were strictly enforced, might breed a dangerous attitude of cynicism. The police may well ask themselves whether society can be so interested in the conviction of offenders, if it withholds from the officers of the law one of the most potent means (and often the only means) of obtaining the evidence necessary for a conviction.

But, it may be said, the arguments for allowing the police to question a suspect do not justify them in taking him to the police station, where he feels himself to be isolated and at their mercy. Why should not the police do their questioning in the suspect's own home, before arresting him? This would certainly be the better practice wherever possible, even though it may not be so likely a way of securing a confession. Yet there are occasions when questioning, if it is to be done at all, must be done in custody. Where the crime is a grave one, and the suspicion already strong, it may not be safe to leave the suspect unarrested. Or the matter on which the accused is questioned may not have come to the knowledge of the police until after he has been arrested. Or, again, the accused may be in custody on one charge, when it is desired to interview him on another.

The mechanical recording of confessions

The trend of the foregoing argument is that questioning in custody is an essential part of police investigation where the author of a crime cannot otherwise be detected, and, consequently, that it should be legalised and at the same time controlled. At the moment we maintain in theory an idealist rule, while conniving at police practices which set it at defiance.

One point needing attention is the possibility of providing for the mechanical recording of confessions. The present practice is for a statement to be written out either by the accused or by the police officer and signed by the accused. But a confession is admissible in evidence even though it has not been reduced to writing, or even though the accused withholds his signature, provided that the judge holds that it was properly obtained. In such circumstances there is likely to be a collision of evidence between the accused and the police as to what exactly the accused said. Often there will have been no shorthand note of an interview with the defendant in which he is alleged to have admitted guilt, and the court will have to make up its mind between the two versions of what passed. Where two police officers have interrogated the accused, the practice, approved both judicially and by the Home Office, is for the two officers to consult together after the interview when preparing their notes of what was said.[22] They may even prepare a joint note.[23] But it is strongly argued that this is unfair to the accused, since, instead of possibly three versions of the actual words used, the two police officers are ranged solidly upon one side of the fence, and the accused upon the other.[24]

Even where the statement is reduced to writing and signed by the defendant, the position is by no means satisfactory, because the statement does not show the questions by which particular answers were prompted. When an answer is obtained to a question, the question is not recorded separately in the written statement, but is embodied in the answer, though the wording was that of the interrogating officer and not that of the accused. If a leading question elicits a monosyllabic answer, it may be subtly misleading to write the result as though the statement implied in the question emanated from the accused.

These difficulties could be obviated if the interview were tape-recorded, so that the court of trial could, in case of challenge, ascertain precisely what the accused said.[25] It is true that tapes can be tampered with, but this danger could be met by requiring the tape to be sealed by the accused person and deposited for transcription with an officer of the court.

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[22] *Bass* [1953] 1 Q.B. 680; Home Secretary's circular to Chief Constables, No. 172/54, dated August 30, 1954.

[23] Devlin, *The Criminal Prosecution in England* (London, 1959), p. 41.

[24] R. Kenneth Cooke in [1954] Crim.L.R. 833.

[25] On one occasion, when a conversation in a police station was tape-recorded, the recording was admitted in evidence: [1956] Crim.L.R. 442. But the technique has not yet been widely adopted in England. One or two American police forces have gone even further, and have experimented with sound motion pictures of confessions; anyone who has seen such a picture will agree that it can be extremely convincing of the authenticity of the confession. Such a sound picture was admitted in evidence in *People* v. *Dabb* (1948) 32 Cal. 2d 491, 197 P. 2d 1.

Probably the most serious difficulty in the way of the proposal is that the police may fear that the presence or suspected presence of a recording instrument will inhibit the answers of suspected persons. A similar fear explains why the police, in interviewing a suspected person, do not write down his answers at the time; they do not want to let the suspect realise that he is dictating evidence against himself. Perhaps the difficulty would be met if it were standard practice for the police, in interviewing any witness in connection with suspected crime, to carry a little attaché case which, placed in an inconspicuous position, would record the conversation without drawing too much attention to itself. If this were a generally known and accepted part of police practice, it might not exercise too damping an effect upon investigations, and it would add greatly to the reliability of any evidence that results. At any rate, when the accused person is ready to make a statement there would seem to be little difficulty in recording his voice; and this is already done in Israel in the case of all major crimes.

Safeguarding against abuses

The practice of interrogation by the police is certainly open to the possibility of abuse. The police, convinced that they have got the right man, may sometimes regard themselves as morally justified in extorting a confession in order to keep an evil-doer under lock and key. The interrogation may be accompanied by promises or threats which would render the confession inadmissible if they could be proved in court, but which are afterwards denied by the officers concerned. A defendant is in a peculiarly weak position when he makes allegations of this kind against the police. The word of two officers, whose character appears to be above suspicion, will almost always be preferred to that of a person accused of crime. Yet it is known, even in England, that some policemen are dishonourable, and policemen are occasionally found in the courts to have given false evidence.[26]

Police questioning may lead sometimes to illegal violence. A policeman who believes that he has a right to ask questions of persons in custody may slip into the belief that he has a right to demand an answer, and even to demand the answer that he expects. Silence is then insolence, and a refusal to confess guilt is an obstruction of the police and a waste of their time. In 1959, two Birmingham detectives struck and kicked a Jamaican in the police station when they were questioning him about his behaviour towards a white woman in the street. They were convicted and resigned from the police force.[27] Allegations of similar conduct were made against members of the Metropolitan Police in the same year; these allegations were rejected after inquiry by the police commissioner, and a demand for an independent inquiry was refused by the Home Secretary.[28] Whatever the merits of this particular issue may have been, the police are in their usual strong position when they are contradicting the evidence of an accused person. Even if the accused bore evident marks of violence on his body, it can always be said that he was violent and fought with the police, and received his injuries in the ensuing struggle.

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[26] *e.g., Sam* v. *Cluney, The Times*, February 3, 1956.

It would be wrong to give the impression that the English police commonly use violence against persons in custody or under interrogation. Allegations of "third degree" methods are rare in England. At the same time, a legislator must always bear in mind the possibility that a relaxation of standards may lead to a deterioration in the conduct of the police, particularly if something happens to make emotions run high.

It is sometimes suggested that an accused person should be entitled to see his solicitor before answering any questions by the police, and indeed that he should have a right to the presence of his solicitor during questioning. This would certainly operate as a substantial safeguard against illegality, but there is one fact that makes it impracticable. As soon as a lawyer is introduced on the scene, he advises his client to answer no questions. Thus if a lawyer were admitted the whole proceding would be stultified. In *Voisin*, for example, it would quite possibly have resulted in the acquittal of a dangerous murderer, for a legal adviser would not have allowed Voisin to write the fatal words.

From the lawyer's point of view, the advice he gives his client to refuse a statement is reasonable. Not knowing the evidence in the hands of the police, it would be highly dangerous to the defence to allow the accused to be questioned.

The defending lawyer's job is to befriend his client and (subject to a few overriding restrictions imposed by professional ethics) to give him the best advice in his own interest. The lawyer is entitled to assume the innocence of his client when all appearances are against him. It has been the experience of centuries that this arrangement is necessary to protect the innocent and to redress the lack of balance between the power of the state and that of the subject. As part of his function, the defending counsel will make full use of the rule that an accused person need not answer until a prima facie case has been established against him—and even then is obliged to answer only in the sense that he is put under the practical necessity of defending himself. We look upon this rule as an important part of the protection given by law to the liberty, dignity and privacy of the subject, notwithstanding that this sometimes makes the task of the prosecution harder. Still, considerations of liberty, dignity, and privacy must give way to some extent to the practical necessities of law enforcement, and for this reason it is necessary to maintain the present position under which a person who is in the custody of the police has no legal right to have his lawyer present while he is making a statement. The Royal Commission on Police Powers and Procedure recommended that in cases where the attendance of friends and legal advisers is open to no objection, the deponent should always be offered the option of having them present. But it seems that in practice the police invariably take the view that the presence of an outsider is open to objection.

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[27] *The Times*, July 20 and 21, 1959.

[28] Parliamentary Debates, House of Commons, June 18, 1959.

For the same reason, it would be impracticable to require that the questioning of a person in custody should take place in the presence of a magistrate. Such a proceeding would be regarded as judicial, and there would be an irresistible demand that the accused should be given the right to legal representation and advice. Besides, the police technique of friendliness and cups of tea could hardly be used to produce confessions if there had to be a formal hearing before a magistrate. From the point of view of the police, the most effective interrogation is one conducted in privacy.

It would, however, be a step towards preventing possible abuses if the accused were removed from the custody of the police. Only long familiarity causes us to accept without surprise the arrangement under which a suspect is placed in the absolute power of those whose duty it is to obtain evidence against him. Consider: we employ police to investigate crime, and expect them to attain a measure of success in the apprehension and conviction of criminals; at the same time, we allow those who are arrested to remain for a time in the custody of the police themselves. The result can be seen in cases like *Rowland* (above, p. 330), where interrogation of the suspect went on far into the night. The situation is a particularly dangerous one where the crime charged is that of an attack on a policeman, for here the *esprit de corps* of the Force is aroused, and the police are tempted to exceed proper limits.[29]

The conclusion is that where a local jail is available, it should be made a rule that persons arrested should be lodged forthwith in this jail rather than in a police cell. This would mean that the physical safety of the accused person would be the responsibility of a different set of officials from the police. The police could be given a reasonable opportunity to question the accused in private in the prison, but the door would have the usual grid through which a prison warder might occasionally look. Thus the accused person would have some feeling of security against possible illegal violence on the part of the police, and the trustworthiness of confessions would be increased. The arrangement would also be to the advantage of the police because they could more easily refute charges of impropriety.

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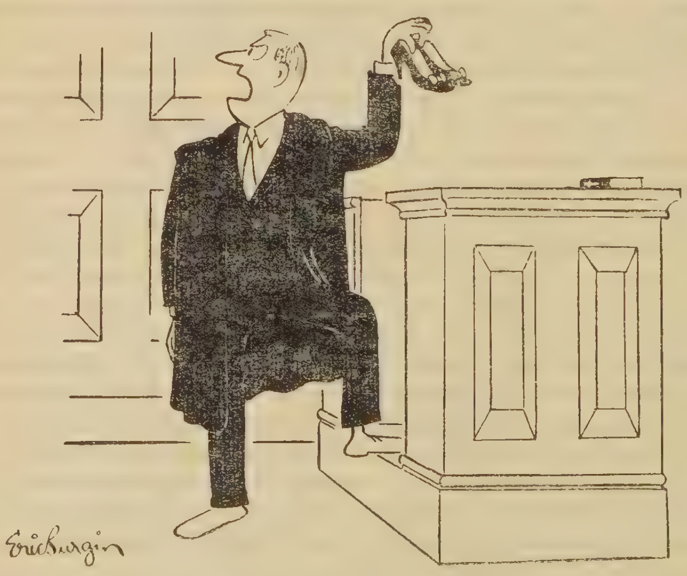
[29] One would like to know, for example, whether the statement made by Bentley at 4 a.m. in the police station was entirely the result of his own initiative. See 19 **M.L.R.** 236.

Whatever may be thought of these particular suggestions, there can hardly be any doubt that the general subject of questioning by the police needs to be reconsidered in the light of present needs and present practices. So long as there is pressure upon the police to keep down the rate of crime, they are likely to ignore restrictions which they feel to be unreasonable. The question we have to face is whether it would not be better for the law to increase the powers of the police, but to require them to keep strictly within the bounds that are still thought to be necessary.



"RECALL, MARY TRIMBLE!"

Questioning by the Police: Some Further Points—I

By J. C. Smith, M.A., LL.B.,
Professor of Law in the University of Nottingham

There is one quite fundamental question concerning the Judges' Rules to which there appears to be no clear answer. Do the Rules *forbid* the police to question persons in custody or do they merely advise them that, if they do question such persons, the answers may be inadmissible in evidence? The problem may be put another way. Are the answers liable to be excluded because the interrogation was wrong? Or is it merely that interrogation is bad police practice because the answers may be excluded? The leading authority on the nature of the Rules, *R.* v. *Voisin*,[1] suggests that the former is the correct view. It was there said that the Rules are " administrative directions, the observance of which the Police authorities should enforce on their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners contrary to the spirit of these Rules may be rejected as evidence by the judge presiding at the trial." This implies that the object of the Rules is fairness in the administration of justice and that a failure to comply with the Rules is unfair. The answers are inadmissible because they were unfairly obtained, being in answer to questions " improperly put "—to use the phrase employed in the 1930 Home Office circular. This seems to be the more logical view for the interrogation must be either permissible or not permissible at the time it is conducted, irrespective of what happens thereafter. It would be absurd that the propriety of questioning should depend on whether an attempt is subsequently made to put in evidence the answers obtained—a matter which is unlikely to be within the interrogating officer's discretion and one to which he may very well not have directed his mind.

The other view that the Judges' Rules simply prescribe what the police must do if they wish any statement they obtain to be used in evidence and that they have nothing to do with police conduct directed to obtaining evidence other than a statement was forcefully put by a police correspondent [2] in this *Review*:

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[1] [1918] 1 K.B. 531; 13 Cr.App.R. 89.

[2] Detective Sergeant G. C. Payne of the Lincolnshire Constabulary. See [1959] Crim.L.R. 676.

"The Judges' Rules are administrative rules and were formulated for the purpose of explaining to police officers the conditions under which courts would be likely to admit in evidence statements made by persons suspected or charged with crime. Surely, therefore, the rules only apply to material required to go in as evidence, and this point should be made clear?

"In my view it is ludicrous to suggest that the police have no right to question a prisoner or person in custody about any crime or offence with which he is or may be charged. Police officers must question prisoners, but must conform to the rules if they want the material they obtain to be admitted in evidence."

This opinion has its attractions when it is recalled that the policeman who fails to observe the Rules commits no crime or tort and that the only possible sanction is that any statement obtained may be excluded in evidence. If, for example, the police are very anxious to discover the weapon with which a murder has been committed and they interrogate a prisoner closely until he tells them where it is, no redress of any kind is available unless the police seek to put the prisoner's statement in evidence. They may well be content to sacrifice the statement for the sake of the concrete evidence to which it leads them. Police so acting certainly commit no legal wrong against the prisoner. Is their action wrong in any sense? The only way in which it could be wrong, it would seem, is as a kind of professional misconduct for which a police officer might be reprimanded by his superiors. Thus Devlin L.J. recently wrote[3]:

"The rules are not imposed upon the police against their will. Some of them were issued with the authority of the judges but at the request of the police; others were issued by the police themselves with the approval of the judges. Thus they formed part of the Police Code with which police officers are expected to conform, just as they are with any other of their regulations."

Where no statement is tendered in evidence, the only possible sanction behind the Rules is disciplinary action by the police themselves and it is thought that the possibility of this may be discounted unless the mere breach of the Rules is accompanied by some more flagrant misconduct. Strict compliance with the Judges' Rules must be highly inconvenient for the police—and an undoubted handicap to them in their present difficult task—and it is too much to expect them to enforce these very strict standards upon themselves. Even if the true meaning of the Rules is that they prohibit all questioning of prisoners, they are hardly likely to be strictly followed where there is no sanction whatever behind them. It is thought, therefore, that the second view is the more likely to be acted on in practice.

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[3] *The Criminal Prosecution in England*, 35.

If the police feel free to ask questions of prisoners where they do not wish to put the answers in evidence, it follows that they regard questioning in general not as wrong *per se,* but merely as a possible bar to the use of the answers. As stated above, questioning must be either permissible or not permissible at the time it is conducted, irrespective of what happens thereafter. Once it is conceded, then, that questioning directed to obtaining evidence other than statements is permissible, it would seem almost inevitable that the rule prohibiting questioning generally should go by the board; and it would not be surprising if Dr. Glanville Williams's view that the Rules are habitually disregarded is correct.

It may very well be that it is necessary that this should be so and that the police would not be able to do their job properly without it. It is unfortunate, however, that we should go on pretending that a strict rule exists if this is not so. The police are generally (and understandably) reluctant to admit that they do not comply with the Rules [4] and a superficial impression may thus be created that strict compliance with the Rules is compatible with effective law enforcement, when this is not the case.[5] If the police need the power to question prisoners, it would be much better if this could be openly stated and some provision made for safeguards against abuse.

That some safeguards are necessary is indisputable. Once questioning is allowed at all there is a grave difficulty in knowing where to draw the line; and the temptation to resort to the subterfuges recommended by Inbau and Reid [6] must be considerable. Indeed, it may be that such practices already occur in this country.

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[4] Cf. Devlin, *The Criminal Prosecution in England,* 39.

[5] *Cf.* a " Memorandum on the Detention of Arrested Persons and Their Production before a Committing Magistrate," prepared by some members of the Bill of Rights Committee of the American Bar Association (reprinted in Chafee, *Documents on Fundamental Human Rights,* 483): " . . . the committal [in *McNabb* v. *United States,* 318 U.S. 332 (1943)] was for a liquor offence, while the protracted questioning described in the majority opinion was about the murder. *Such an interrogation after arrest would not be permitted by the English police regulation.* In this particular case the two offences were closely connected, but your Committee may care to consider a more general problem on which we express no opinion: How far is it desirable federal police practice to commit a person for a minor offence, and afterwards interrogate him at length about a major offence? " (My italics.) There is some indication that the English police take a more lenient view of the scope of their regulation. See *R.* v. *Powell-Mantle* [1959] Crim.L.R. 445; Crim.C. & C. 34; and controversy arising therefrom: [1959] Crim.L.R. 673.

[6] See Glanville Williams, above, p. 337.

According to an independent contributor to *The Listener*[7] a recent television programme (not seen, it must be admitted, by the writer), which purported to be documentary, and to be "based on the methods and style of a police interrogator whom Colin Morris met in Liverpool,"[8] dealt with the interrogation of three suspected persons "pulled in" in connection with a robbery. A police sergeant "by a combination of blarney, double-talk, pure mendacity and homespun pep-talk" solved the mystery. According to this commentator, the sergeant, "in the course of his interrogation, tells a number of thumping lies. He tells each of the crooks, separately, that the other two have confessed and are blaming everything on him. He tells one of them that his mother has been questioned and has given him away. And so on." The reaction of the commentator to all this is that the presence in the police force of such a man as the sergeant "makes a mockery of the whole conception of law as the instrument of morality. 'Set a liar to catch a liar' may be good practice but is corrupting theory." Whether such things really go on is another question; but at least there seems to have been no such spate of letters to the B.B.C., protesting at this misrepresentation of police practice as to induce them not to repeat the programme—all the more unfortunate at a time when relations between police and public are somewhat strained.

It is thought that most people would find devices of this sort as offensive and improper as does *The Listener's* critic. Certainly it seems likely that the courts would take such a view. In *R.* v. *Podola* a medical witness said he thought it was the duty of the police to try and trap "murderers" and that it was a proper thing for a police officer to say to the accused, "I am your friend. Just say it went off accidentally." He was sharply corrected by the trial judge, Edmund Davies J. (*The Times*, September 16, 1959). A much more serious objection to this kind of thing is that unrestricted questioning may endanger the innocent. Wigmore's opinion was that "If there is a right to an answer, there soon seems to be a right to the expected answer—that is to a confession of guilt. Then the legitimate use grows into the unjust abuse; ultimately the innocent are jeopardised by the encroachment of a bad system."[9] How this can happen is illustrated by a French case reported in *The Times* for February 3, 1955. One Jean Deshays was convicted of murder in 1949 and sentenced to ten years' imprisonment. He had signed a confession of the crime after being questioned by the police; yet now it was apparently proved that he did not commit the crime and his conviction was quashed. He alleged at the time that he had been beaten and molested by the police but they, of course, denied this. In explanation of what had happened, the Public Prosecutor referred to the task of the police and argued that the role of an investigator was a difficult one. " When it is a question of an individual who knows what he risks in admitting his participation in crime and denies it," he added, " it is clear that *the police cannot content themselves with pure and simple denials*." He denied that any violence had been used and suggested that the police " had more or less consciously suggested the answers to their questions." They felt, as Wigmore says, that they had " a right to the expected answer "—and eventually they got it.

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[7] October 22, 1959, p. 700, "Critic on the Hearth," by Hilary Corke.

[8] *The Radio Times*, March 18, 1960, announcing the repeat performance of "one of the television highlights of 1959" ("sustained interrogation by a man who uses every psychological trick in the trade to get his answers").

[9] Evidence, § 2251.

The flaw in the argument of those who favour unlimited interrogation is that it tends to assume that the subject is guilty. "A policeman should be as free as a fireman to protect the community," said a witness before the American National Commission on Law Observance and Enforcement. " Nobody even thinks of hedging a fireman about with a lot of laws that favour the fire." Professor Inbau has a similar outlook: " In professional, business and social affairs, ethical practices are considered desirable and are insisted upon. For some reason or another the notion has developed that *a criminal offender* [9a] should be interrogated on the same level." [10] A fire is quite plainly an evil to be suppressed; but the analogy is misleading for an accused person is not necessarily guilty; nor is a suspected person necessarily " a criminal offender." While the great majority of persons taken into custody by the police are, no doubt, guilty, some are not; and it is impossible to have one rule for guilty prisoners and another for innocent or " doubtful " prisoners since we do not know which are which until a jury has given its verdict.

It is easy to suggest that the police should be allowed to interrogate prisoners subject to satisfactory safeguards. It is quite another matter to suggest what those safeguards should be—and the writer does not pretend to have an answer. Dr. Williams's objections to the suggestion, that the accused should have the right to have his solicitor present or that the questioning should take place in the presence of a magistrate, are formidable. They would cramp the style of the police too much to be acceptable. But his own interesting suggestion (above p. 341), that persons arrested should be lodged forthwith in a local jail perhaps hardly goes far enough. If the police were left to question the prisoner in private, apart from any interest a warden happened to take, it is difficult to see that there would be very much restraint upon the scope of the interrogation or the use of subterfuge, threats or promises. Violence, certainly, might be precluded, but it is doubtful if that is the major problem. Moreover, it does not appear that this solution would do anything to get rid of the practice of "detention for questioning." However unfounded the curious distinction between arrest and "detention" may be, the fact appears to be that it is drawn and acted upon by the police. It would appear likely that the temptation to "detain" instead of arresting would be greater than at present if Dr. Williams's suggestion were adopted, and the practice might become even more widespread. In America statutes requiring the prompt production of a prisoner before a magistrate and his subsequent committal to the custody of the marshal have been evaded by the police because they felt that compliance with the law was incompatible with efficient law enforcement.[11] The superintendent of the District of Columbia police testified: "The minute he is removed from our custody, we cannot proceed satisfactorily any further in our investigation." [12] The English police would not necessarily take the same view, but it seems likely that they would.

[9a] Writer's italics.

[10] " The Confession Dilemma in the United States Supreme Court ": 43 *Illinois Law Review*, 442 (1948).

It is submitted that this very difficult problem can only be solved in consultation with the police and in the light of a frank statement by them of just what powers they really require in order to obtain the evidence they need. It is a matter which deserves the close attention of the recently appointed Royal Commission.

Questioning by the Police: Some Further Points—2

By Christopher Williams

Readers of Lord Justice Devlin's *The Criminal Prosecution in England* [1] may well have read with surprise of the almost accidental manner in which the police have acquired, over the past century or so, their extremely delicate and important duties in connection with the investigation of crimes, the interrogation of witnesses and the establishing of the guilt of accused persons. These functions, which today are generally accepted as a natural part of the police officer's duty, were, as Lord Justice Devlin shows, transmitted to them by the justices of the peace, who themselves had received them at the hands of the judges a matter of five centuries or so ago.

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[11] *Cf.* the Memorandum prepared by members of the Bill of Rights Committee, above, n. 3.

[12] *Ibid.*

[1] Oxford University Press, 1960.

The police force was instituted primarily as a preventive body, intended to discourage the commission of crime, rather than to establish the case against the author of a crime after it had been committed, for such functions were, in theory at any rate, regarded as being within the province of the justices. Indeed, for some ten years after the formation of the Metropolitan Police, London magistrates persisted in discharging these functions, and maintained their own staffs of investigating and interrogating officers in opposition, so to speak, to the regular force. But such a sharing of functions could not be expected to survive for long, once the new force had found its feet. For one thing, as Dr. Glanville Williams suggests in an article in this issue,[2] such administrative activities were incompatible with the increasingly judicial status and function of the magistracy. For another, the police soon established their own effective system of inquiry and interrogation, largely on their own initiative. By 1848 it was considered appropriate formally to end this part of the magistrates' duties.

The police acquired these responsibilities in an atmosphere singularly free from judicial restraints and controls. Indeed, such limitations as there are even today have arisen from the simple proposition of the law of evidence to the effect that a confession, as an exception to the rule excluding hearsay evidence, is admissible only if it was made voluntarily and without threats and so on. It is to this primary rule, of course, that what we know as the Judges' Rules owe their origin. All the Rules except two[3] are designed to ensure that whatever the accused person says is said voluntarily, and is therefore, at any rate prima facie, admissible. In other words, the Rules are primarily concerned with what a person says after a police officer has made up his mind to arrest or charge him.

From this, it is apparent that there are no restrictions on the interrogative activities of the police up to this point. Indeed, the first of the two exceptions referred to above, specifically says that when a police officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information can be obtained. The admissibility of the answers to such questions is, of course, governed solely by the ordinary rules of evidence.

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[2] p. 325.

[3] Rules 1 and 7.

So what it amounts to is this. When the police are investigating a crime, they are quite unhampered by formal restrictions, apart, of course, from such restrictions as arise from the law governing matters like arrest and false imprisonment, up to the moment when they think they have enough evidence to justify arrest. At that point, certain restrictions come into force, until the next stage, decision to prefer a charge, is reached, when further restrictions begin to operate. It is important, however, to note that the restrictions (with one exception [4]) regulate not so much the putting of questions as the admissibility of the anwers. Nor, for that matter, do they affect the results flowing from questions put in contravention of the Rules. A weapon may be found, stolen property may be recovered, the victim of criminal violence may be traced from something said by a prisoner, even though, for perhaps technical reasons, the statement itself may be inadmissible. Similarly, the discovery of further facts as a result of such a statement may establish the truth so firmly that the accused realises the futility of further attempts to escape the consequences of his crime, and so pleads guilty.

Is there anything necessarily wrong or objectionable in such consequences? Dr. Williams has some interesting things to say upon this aspect of the matter in the article already referred to.[2] But it is a question that a crime-beset society such as ours will have to face for itself before long, and answer. For, despite what may be said to the contrary by the academics and the theorists, the law exists for the benefit of the community. It is not an elaborate game of chequers, governed by rules of absolute ethical validity, so much as a means, admittedly imperfect, by which society can protect itself from the socially inconvenient consequences of such prohibited acts of self-indulgence as murder, rape, theft, disorder, and so on. It must, therefore, be drafted in terms of human nature and, if you like, of human weaknesses. The procedures it contemplates for determining whether a particular person has, or has not, committed a particular crime must be capable of operation by the agencies employed by society for that purpose.

Police officers may therefore find some reassurance in the reflection that, though the high winds of academic controversy and complaint may be noisily ruffling the branches above their heads, they stand in relative quiet below, with their feet on the ground, surrounded by the strong trunks of judicial understanding. For it is to the courts that the police must look for control and guidance in their difficult duties. The judges, and the Bar from which the judges come, are practical men, and know well that the police have a job to do, and that if they are prevented from doing it reasonably effectively, it is society which must pay the price.

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[4] Rule 7.

This is not to say that the police can safely try their best to secure convictions by outmanoeuvring the guidance the judges have given them in the form of the Judges' Rules. They must continue to act fairly and justly within the general terms of their duty to keep crime within reasonable limits. This they have done in the past, and no evidence whatsoever has been adduced to suggest that mistakes by the police in this field are increasing. Indeed, Lord Justice Devlin considers that it is only because there is this general sense among police officers that the accused ought to be fairly treated that the English system works at all.[5]

Nor is it to say, on the other hand, that the police can expect that the limitations they are under will remain for ever as they are today. Changes are inevitable. There will always be a tendency to formalise and restrain the activities, however well conducted, of any administrative body. It was this process of formalisation which, as Lord Devlin suggests, squeezed first of all the judges, and then the magistrates, out of the business of prosecution of offenders.[1] Whether it will squeeze the police out of this business too remains to be seen; but it is clear that the existing restrictions will tend to increase, if only through the medium of judicial decisions on the meaning of some of the phrases used in the Judges' Rules. Some idea of areas of possible change may be gained from the article in this issue by Mr. Brownlie,[6] and police officers would do well to consider it, so that they may find themselves ready to cope with changes as they come. Examples of some of the refinements that have so far accumulated around the Rules are the precise moment when a police officer makes up his mind to arrest a person, or to charge an arrested person; questioning a person in custody on one charge about another offence; the exact meaning of custody; whether showing a person in custody an article which is an exhibit in the case against him amounts to cross-examination forbidden by rule 7, or is allowed under the supplementary rule 8; whether to explain to an arrested person the details of a charge against him amounts to cross-examination under rule 7, or is permitted in accordance with *Christie* v. *Leachinsky*.[7] Common sense and experience should suggest others that are likely to come up for consideration as case law accumulates.

The police are faced with the practical administrative duty of arresting criminals. While they should not allow themselves to be deflected from this duty by misinterpretations of their efforts by observers who do not share this onerous responsibility, they should nevertheless bear in mind that the support and understanding they can expect from the courts will be forthcoming just so long as they deserve it. The accused man knows the truth, and if he chooses to tell it to the police, then the police are entitled prima facie to tell it to the court. The more the truth is withheld from the court, the more society will suffer in the end. It does not seem to matter greatly whether the withholding is the result of unnecessary and academic restrictions on the powers of the police, or of improper excesses on the part of the police; in either case it is society that will pay in the end.

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[5] *The Criminal Prosecution in England*, p. 22.

[6] p. 298.

[7] [1947] 1 All E.R. 567.

Practice and Procedure

Sentence

Taking other offences into consideration

In R. *v*. Gore (Court of Criminal Appeal: Lord Parker C.J., Donovan and Thesiger JJ.: March 14, 1960) the appellant had pleaded guilty at a magistrates' court to three offences of obtaining money by false pretences and seventeen other offences which he wished to be taken into consideration were put to him. He was committed to a Crown court for sentence. On appeal against the sentence of three years' corrective training imposed by the Crown court, the Court of Criminal Appeal stated that the seventeen other offences were not put to him in the Crown court, although the Recorder had informed the court that those offences had in fact been taken into consideration by him. The proper course in every case was that the cases to be taken into consideration should be put to the prisoner at the Crown court even though they had already been put to him at the magistrates' court. Thus the matter would appear on the transcript and this court would be able to see the nature of the offences, which were the subject-matter of the appeal. [H. P.]

Court of Criminal Appeal

Reference of appeal to court by registrar for summary disposal

In R. *v*. Summers (Court of Criminal Appeal: Streatfeild, Donovan and Thesiger JJ.: March 21, 1960) the little known procedure under section 15 (2) of the Criminal Appeal Act, 1907, was used. This section enables the registrar, where the ground of appeal is one of law alone, to refer it to the Court of Criminal Appeal for summary disposal if it appears not to involve any point of substance. The appellant had been indicted for assault with intent to commit a felony (to ravish) and for indecent assault. He was convicted of common assault. His ground of appeal was that he had not had the opportunity of pleading guilty to the offence of which he was found guilty. As the court pointed out, it would have been open to him to plead guilty to common assault on the indictment as laid and there was nothing in the point taken by the appellant. [H. P.]

Assizes

Indictment not settled by first working day

In R. *v.* WINTER, B. SMITH AND J. SMITH (Herts Assizes ; Byrne J. ; January 20, 1960) before the accused were arraigned, counsel for Winter objected to the indictment. All three accused had been committed for trial on two charges. By the first working day of the Assizes (January 19) and indictment had been prepared based only on these two offences, the second of which, now count 2, was wounding with intent to resist apprehension, contrary to section 18 of the Offences against the Person Act, 1861. On the morning of January 20, the second working day, a further offence of assault contrary to section 38 of the same Act, founded on the same facts as count 2, was added to the document as count 3, and the indictment was then signed by the clerk of Assize. Counsel referred to rule 2 of the Indictments Procedure Rules, 1933 (*Archbold*, § 175), which provides that except with leave of the judge, no bill of indictment shall be prepared after the first working day of the assizes. Rule 1 states that as soon as an indictment has been settled to the satisfaction of the proper officer of the court, it shall be deemed to have been duly preferred. No leave to prefer a late indictment had been sought in this case. There were thus two alternatives. If there existed a valid indictment, it contained only the first two counts. In *R.* v. *Jennings* (1950) 33 Cr.App.R. 143, Humphreys J. said, *obiter*, at page 150, that a new count might properly be added under the Indictments Act with leave of the court. But there was no direct authority for the practice of adding counts in the Indictments Act or elsewhere.

The other alternative was that the indictment had not been settled to the satisfaction of the clerk of the assize by the first working day, in which case no indictment had been preferred at all. It was conceded that in the latter case the prosecution could now ask leave to prefer a late indictment; and that in any event the prosecution could apply for a bill of indictment. But either of these procedures involved asking leave of the judge, who might or might not grant it, in his discretion.

Byrne J. declined to entertain the prosecution argument that an indictment finally settled to the satisfaction of the proper officer on the second working day could be deemed to be duly preferred on the first working day. He did not specifically decide whether there was, in law, no indictment at all, or merely an indictment containing just the first two counts. He doubted whether a judge could give leave to add a count once the indictment had been preferred. He directed that in this case the prosecution should carry out the procedure laid down in rules 3 and 4 of the Indictments Procedure Rules, and apply to him in chambers for a bill of indictment.

[A BARRISTER.]

Case and Comment*

CONSPIRACY

Indictment—evidence, admissibility—substantive charges

R. v. Dawson and Wenlock

Court of Criminal Appeal: Finnemore, Davies and Hinchcliffe JJ.: January 18, 20, 21, 22, 25, February 2, 1960; [1960] 1 W.L.R. 163.[1]

D. and W. were convicted at the Central Criminal Court of conspiracy to cheat and defraud and other offences. The conspiracy charged was that D. and W., with four other accused, had conspired with four companies and other persons unknown between November 1, 1954, and December 31, 1957, to cheat and defraud such persons as might be induced to part with moneys and goods in connection with transactions relating to the purchase, sale and processing of orange concentrate, and the purchase, sale and conversion of buses, bogies and landing vehicles, and such persons as might be induced to discount bills of exchange accepted by D. or the companies, by false pretences and by fraudulent conversion and by other fraudulent devices. The remaining fourteen counts in the indictment were in respect of substantive offences of false pretences, obtaining credit by fraud and fraudulent conversion and included (a) count 7 charging obtaining a valuable security by false pretences and count 8, arising out of the same facts, charging obtaining credit by fraud; (b) count 11 charging fraudulent conversion; and (c) count 14 charging obtaining credit by false pretences. On appeal to the Court of Criminal Appeal the principal questions raised were (i) whether charges rejected by the magistrate could properly be included in the indictment; (ii) whether the jury, in a case where substantive charges were laid in addition to a conspiracy charge, had been properly directed to consider the conspiracy charge first and then the substantive charges; (iii) whether, on the facts, the conspiracy charged more than one conspiracy so that the conspiracy count was bad for duplicity; (iv) whether it was proper to charge conspiracy in addition to substantive charges; (v) whether the verdict in W.'s case was reasonable; (vi) whether, in the case of counts 7 and 8, which were alternative counts, the conviction ought to be treated as if it had been on the lesser charge; (vii) whether the evidence of part of the public examination of D. in bankruptcy had been properly admitted at the trial in relation to count 11; and (viii) whether, on count 14, there had been an obtaining of credit where D. had failed to deliver goods to a purchaser who had paid for them, in the absence of any arrangement for future delivery.

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* Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For the appellant Dawson: *J. Platts-Mills* (instructed by Messrs. G. B. Hemming & Son). For the appellant Wenlock: *James Burge* (instructed by Messrs. H. Davis & Co.). For the Crown: *J. M. Griffith-Jones* (instructed by the Director of Public Prosecutions).

Held, allowing D.'s appeal in part and allowing W.'s appeal, that:

(i) Several charges had been rejected by the magistrate at the preliminary hearing, but some of them nevertheless appeared in the indictment. That course might be permissible, and in certain cases necessary, but it was an undesirable practice and might easily in some cases work hardship on defendants. It was a right which ought to be very carefully regarded.

(ii) The jury in the present case had been told to look at the whole of the case and, having formed a view about the whole of the case (which really meant the conspiracy), then to proceed to the substantive charges. This court thought that the proper course was to proceed the other way round, to deal with the substantive charge and then to see how far the conspiracy count should be there at all and if it was made out.

(iii) After careful consideration this court was of opinion that, although there may have been conspiracy, there was more than one conspiracy. D. was dealing with orange juice, buses, bogies and landing vehicles; and he was dealing with bills of exchange, with different kinds of people at different times over a period of three years. It was no more correct to charge several conspiracies in one count than it was to charge several other offences in one count. This count, therefore should be quashed.

(iv) This court had more than once warned of the dangers of conspiracy counts, especially long conspiracy counts like the present one. First, if there were substantive charges which could be proved, it was in general undesirable to complicate and to lengthen matters by adding a charge of conspiracy. Secondly, it could work injustice because it meant that evidence which otherwise would be inadmissible on the substantive charges became admissible. Thirdly, it added to the length and complexity of the case so that the trial might easily be well-nigh unworkable, and imposed a quite intolerable strain both on the court and on the jury.

(v) This court was not acting as a sort of super-jury and was reluctant to interfere with the verdict of the jury; but they had the overall duty of seeing that there had been no miscarriage of justice. W. was a typical example of a man who had been sunk by means of a mass of evidence about frauds of different kinds, with the great majority of which he had no connection. Having seen the documents on which so much of the case depended, this court had come to the view that the convictions of W. must be quashed.

(vi) As to counts 7 and 8, D. had been convicted on both counts, despite the fact that they were really alternative. There was, however, no rule that the conviction should be treated as if it had been on the lesser charge. This court had to look at the realities of the position and there was here the plainest possible evidence of false pretences. Accordingly, the conviction of false pretences would be affirmed and the alternative conviction of obtaining credit by fraud (which was the lesser offence) would be quashed.

(vii) Evidence of answers given by D. in his public examination in bankruptcy was inadmissible evidence. Protection was afforded in such a case by section 43 (3) of the Larceny Act, 1916. Thus the evidence had been wrongly admitted at the trial, but this court did not think that the evidence could have had any real effect on the minds of the jury. In the circumstances the proviso to section 4 (1) of the Criminal Appeal Act, 1907, would be applied and the conviction on count 11 affirmed.

(viii) As to count 14, D. had sold goods to a purchaser who paid for them. At the time of the sale D. did not have in his possession the whole quantity of goods contracted for, and he was to make up the quantity from elsewhere. In these circumstances, he did not obtain credit. In the absence of any agreement for future delivery of goods, as in *R.* v. *Ingram* [1956] 2 Q.B. 424, there was no obtaining of credit. [H. P.]

Commentary. (i) By section 1 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, a bill of indictment may include any counts founded on facts or evidence disclosed before the examining magistrates, either in substitution for or in addition to counts charging the offence for which the accused was committed for trial. In *R.* v. *Morry* [1946] K.B. 153 it was held that it was permissible under this provision for the prosecution to insert counts, upon which the justices had refused to commit, and that no previous application to the court was necessary. Objection might be taken to quash before the trial judge.

(ii) It is rare in conspiracy cases for there to be direct evidence of the agreeing together which is the *actus reus* of the crime. This usually has to be proved by evidence of subsequent acts, done in concert and so indicating a previous agreement. Where those subsequent acts amount to substantive crimes, with which the accused are also charged, it is logical that the counts charging the substantive crimes should be considered first; for it is the commission of these substantive crimes which is the evidence of the conspiracy.

(iii) The defence of " more than one conspiracy " was raised without success in the Brighton police case—*R.* v. *Hammersley and Others* (1958) 42 Cr.App.R. 207; [1958] Crim.C. & C. 18. The present court seems, with respect, to have taken a more realistic view of the facts than did the court in the earlier case.

(iv) The trial in the present case lasted nine weeks. Whether a jury is capable of remembering the evidence which it has heard over so long a period sufficiently well to discharge its function properly may well be doubted. *Cf.* Glanville Williams, *The Proof of Guilt*, 241–242.

(v) This finding of the court is a rather startling and disturbing illustration of the dangers referred to by the court. It is hoped that the use of the word " typical " does not indicate the court is of the opinion that cases are common of a man being " sunk by means of a mass of evidence about frauds of different kinds, with the great majority of which he had no connection either direct or indirect, and in which he took no part whatever and in which his name was never even mentioned."

(vi) The fact that a jury convicts of two or more offences which are really alternatives does not tend to increase one's confidence in jury trial; for if they have been properly directed, they have evidently failed to understand the direction. It might be thought that the only safe course, in view of such a misunderstanding, would be to quash the conviction; " But nowhere has the court said that in such circumstances the conviction ought to be quashed. This court does its best not to favour technicality, but to deal with substance as the Act of Parliament intended it should ": *per* Reading L.C.J. in *R.* v. *Smith* (1915) 11 Cr.App.R. 81, 83. When the court is in doubt as to which of two offences was committed by the accused, " the proper course . . . is to take the view that the jury meant to find the appellant guilty of the lesser offence": *per* Isaacs L.C.J. in *R.* v. *Johnston* (1913) 9 Cr.App.R. 262, 264. In the present case it would appear that the court was in no doubt as to which was the offence of which the accused was really guilty.

(vii) The court held that section 43 (2) had no application to bankruptcy proceedings, notwithstanding its reference to proceedings in "any court of law or equity." Prima facie this would clearly include bankruptcy proceedings; but the court was persuaded that this was not so by reference to earlier legislation. The protection afforded by section 43 (3) is less extensive. Under section 43 (2) a person who has been compelled to disclose that he has committed one of the specified offences is not liable to be convicted of that offence "upon any evidence whatever." Under section 43 (3) the answers which he has been compelled to give are inadmissible, but he may be convicted on other evidence.

(viii) The sale referred to in count 14 was presumably governed by the general rule laid down by section 28 of the Sale of Goods Act, 1893, under which delivery of the goods and payment of the price are concurrent conditions. The governing consideration would seem to be whether the seller is under an immediate *obligation* to deliver the goods when the price is paid, and not whether the buyer in fact pays the price without getting the goods. If the seller is under an immediate obligation to deliver the goods on payment of the price—as was apparently so in the present case—then he has not obtained credit, even though he does not in fact deliver the goods immediately.

CROWN PRIVILEGE

Entries in detective's diaries—documents in possession of Director of Public Prosecutions

Auten v. Rayner (No. 2)

Queen's Bench Division: Glyn-Jones J.: [1960] 2 W.L.R. 562.[2]

In an action in which conspiracy, false imprisonment and malicious prosecution were alleged against a C.I.D. detective, certain entries in the detective's diaries were sealed by an order of the Home Secretary. During the hearing of the action, application was made for the unsealing of the entries on the ground that there was evidence to show that they were not within the class of documents to which Crown privilege applied.

Held, refusing the application, (1) that the claim for Crown privilege was not one made in respect of a class of documents, but in respect of each and every sealed entry, and that the court had no power to go behind the certificate of the Home Secretary;

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[2] For the plaintiff: *Neil Lawson, Q.C., John Platts-Mills* and *David Turner-Samuels* (instructed by W. H. Thompson). For the Crown: *The Attorney-General* (*Sir Reginald Manningham-Buller, Q.C.*) and *J. R. Cumming-Bruce* (instructed by the Treasury Solicitor). For the first and second defendants: *Christmas Humphreys, Q.C.* and *H. K. Woolf* (instructed by Herbert Baron & Co.). For the third defendant: *Geoffrey Veale, Q.C.* and *W. W. Stabb* (instructed by the Solicitor, Metropolitan Police). For the fourth defendants: *Maurice Lyell, Q.C.* and *S. H. Noakes* (instructed by Chamberlain & Co.).

(2) that a claim for Crown privilege (which had been upheld while the reports were in the possession of the detective) still applied although the reports were now in the possession of the Director of Public Prosecutions; and

(3) that it was unnecessary for a claim such as the present claim to be supported by an affidavit by the Attorney-General.

Commentary. In an interlocutory appeal in the present case (*Auten* v. *Rayner* [1958] 1 W.L.R. 1300) the Court of Appeal said that they expressed no view on the question of privilege where the Secretary of State's Certificate is expressly based on the premise that the documents in question belong to a particular class of documents and it is then shown *aliunde* that he is mistaken in that premise. The Home Secretary gave as his reason for withholding the entries in the diaries in the present case: " because they indicate or tend to identify the sources of information given in confidence for the purpose of a criminal investigation." It was argued that there was evidence that a particular entry or entries did not come within this description, and therefore, that it was open to the court, under the above dictum, to reject the claim of privilege. The ruling that the claim was made, not in respect of a class of documents, but in respect of each entry, took the case out of the ambit of the dictum.

EDUCATION ACTS

Failure to comply with school attendance order—question of fact

Baker v. Earl

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Davies and Ashworth JJ.: *The Times*, February 6, 1960.[3]

An information was preferred against B. alleging that she had unlawfully failed to comply with school attendance orders served on her in respect of her four children, aged 14, 13, 12 and 10. The justices found the case proved. B. appealed to the appeals committee, who dismissed her appeal.

On her appeal to the Divisional Court, by way of case stated, the appeals committee found that the children had no lessons or prescribed course of study, and that B, who was without any educational qualifications herself, encouraged the children to follow any subject which interested them; and that, in the circumstances, B. had failed to satisfy the committee that the children were receiving efficient full-time education " either by regular attendance at school or otherwise," as required by section 36 of the Education Act, 1944.

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[3] B. appeared in person. For the local education authority: *Paul Wrightson.*

Held, dismissing the appeal, that the findings of fact of the appeals committee could not be challenged in the Divisional Court. [D. C.]

EVIDENCE

Admissibility—statement made in answer to different charge

McAdam v. H.M. Advocate

High Court of Justiciary: Lord Justice-General (Clyde), Lords Carmont and Russell: October 16, 1959.[4]

McAdam was charged with an assault to severe injury a few hours after a crime had been committed. He was cautioned by the police, and made a statement in answer to the charge. Subsequently, he was charged with attempted murder. At his trial for attempted murder, objection was taken to the admissibility of the statement which he had made in answer to the charge of the assault to severe injury. The objection was repelled. On appeal against conviction,

Held, that where both charges involved crimes within the same category, and that the *species facti* was substantially the same, evidence of the statement made by the accused person in answer to the lesser charge was admissible in a subsequent trial on a more serious charge.

Per Lord Justice-General (Clyde): " The original charge was a charge of an aggravated assault. The ultimate indictment embodied a charge of assault with still greater aggravation, but still involving a crime within the same category. The *species facti* in both charges was substantially the same."

Per curiam: " Capital murder may be in a different position." [D. C.]

Commentary. *Cf. H.M. Advocate* v. *Graham*, 1958 S.L.T. 167; [1958] Crim.C. & C. 122, where Lord Sorn held that a statement made by an accused person in answer to a charge of an assault occasioning grievous bodily harm was not admissible at his trial on a subsequent charge of capital murder. Lord Sorn thought that case a borderline one; and was careful to add that he was thinking only of a man ultimately standing charged with capital murder and was by no means suggesting that every statement made in reply to a lesser charge should be inadmissible in a trial upon a more serious charge.

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[4] For McAdam: *Coutts* (instructed by A. C. Bennett & Son). For the respondent: *Carmichael, A.-D.* (instructed by Lionel I. Gordon, Crown Agent).

The confession in the present case would, of course, have been admissible in English law—as, indeed, would that in *Graham*.

Husband and wife—marriage between witness and defendant between committal and trial

R. v. Rustislave Tchernikeese, otherwise known as John Edward Gordon and Leslie Victor Bernard Shaw

Central Criminal Court: Judge Maxwell Turner: January 14–February 10, 1960.[5]

The name of Mrs. Ivy Emma May Coulstock appeared on the back of the indictment as a witness. She had given evidence in the lower court but after that date had married the defendant Shaw. At the close of the case for the prosecution, Mr. Raphael Tuck, on behalf of Shaw, moved that as her name appeared on the back of the indictment, the prosecution should call Mrs. Shaw as a witness and at least tender her for cross-examination. Quoting from *Archbold*, 34th ed., § 1373, he said he wished to cross-examine Mrs. Shaw in the hope of obtaining answers favourable to Shaw. The rule that a wife should not be called as a witness against her husband was to prevent him being prejudiced by her giving evidence against him. It was wrong that a rule designed as a shield should be used as a weapon. Mrs. Shaw had not, in fact, given any evidence against Shaw in the lower court. Mr. Tuck went on to ask that if she were not called by the prosecution, she should be called by the court in its discretion. Mr. Sebag Shaw, in reply, said that he was asked to break a rule of common law of long standing. The law forbade him to call Mrs. Shaw, *vide Archbold*, §§ 1334 (4) and 1337 (opening sentences). Should Mrs. Shaw give evidence against Tchernikeese on counts 3 and 4, she would automatically give evidence against Shaw, who was charged with aiding and abetting in those two counts. The prosecution would have no objection to calling Mrs. Shaw to oblige the defence but were prohibited from doing so.

Held, Mrs. Shaw was not a competent witness for the Crown at common law. The charges contained in the indictment were not excepted at common law or by statute. There was no need to rule on the submission that as her name appeared on the back of the indictment she should be called by the prosecution, but his lordship's view on that point was that the prosecution had a discretion in the matter; the proper course was for the party desiring her evidence to call her.

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[5] For the prosecution: *Sebag Shaw* (instructed by Board of Trade Solicitor. For Tchernikeese: *J. Hutchinson* (instructed by Alfred Kerstein & Co., 3/4 Clements Inn, W.C.2). For Shaw: *Raphael Tuck* and *H. Palmer* (instructed by Beach and Beach, 364 Kilburn High Road, N.W.6).

The case for Shaw was opened on the assumption that Mrs. Shaw would be called by Shaw but, subsequently, the court was informed that she was in an early state of pregnancy and that she had worked herself up into such an emotional state that were she to be called to give evidence there was a danger that she might miscarry.

On February 10, Tchernikeese failed to surrender to his bail. The indictment charging only misdemeanours, the jury retired in his absence and found both prisoners guilty on certain counts. The recognisances of Tchernikeese and his two sureties were estreated.

[C. B. ORR, *Barrister-at-Law*.]

Commentary. The common law rule was that the wife of a prisoner was entirely incompetent to give evidence at his trial, either for or against him (except on charges of personal violence committed against the wife, when she was a compellable witness for the Crown). The Criminal Evidence Act, 1898, which made wives and husbands of prisoners competent witnesses *for the defence*, left the common law position regarding evidence for the prosecution unchanged, except in the case of those offences, mentioned in the schedule to the Act, when the spouse is a competent (but not compellable) witness for the prosecution: *Leach* v. *R.* [1912] A.C. 305.

In *Adel Mohammed El Dabbah* v. *Att.-Gen. for Palestine* [1944] A.C. 156, the Privy Council held that the prosecutor has a discretion as to what witnesses should be called for the prosecution and that the court will not interfere with the exercise of that discretion, "unless, perhaps, it can be shown that the prosecution has been influenced by some oblique motive." It would seem, however, that this discretion can hardly continue to exist when the witness has become incompetent.

FALSE PRETENCES

Intent to defraud—dishonest conduct subsequent to acquisition

R. v. Wright

Court of Criminal Appeal: Lord Parker C.J., Cassels and Ashworth JJ.: February 2, 1960.[6]

W. was convicted at quarter sessions of two offences of obtaining money by false pretences. The facts were that W. had obtained sums of money from the Post Office on behalf of one G. by means of a written authority signed by G. and purporting to be witnessed by M., a third party. The prosecution's case was that the third party's signature had been forged by W. The jury were directed that a necessary ingredient of the offence was an intent to defraud, and were then directed: "If, in fact, you are satisfied that the accused by writing this signature on this document in each case—and knowing quite well that it was, of course, not written by the person it was supposed to have been written by [*i.e.*, M.] induced the lady behind the counter to hand over the money, and that she would never have handed it over if she had known that [M.] had not signed it—if you are satisfied of that—then that amounts to an intent to defraud. It does not matter whether the money was paid over to [G.] or not; the question is: Was the Post Office induced to hand the money over? That is the point, and if they were induced to do that in circumstances where they would not have done if they had known the truth, that amounts to an intent to defraud, because the Post Office is being made to do something that they would not otherwise have done, which is to their detriment." On appeal to the Court of Criminal Appeal:

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[6] For the appellant: *Martin Tucker* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *M. S. Viner* (instructed by the Director of Public Prosecutions).

Held, allowing the appeal, that it was, of course, an essential ingredient of this offence that the action must have been done with intent to defraud which, as had been said in this court over and over again, was really synonymous with dishonesty. The direction [set out above] was, in effect, withdrawing that issue from the jury and stating that the facts themselves amounted to an intent to defraud. No doubt what was there stated was evidence upon which, together with all the other evidence, the jury might have found that W. was acting dishonestly. Although the jury had been rightly directed, both before and after the passage complained of, as to the necessary intent amounting to dishonesty, this could not be said to cure the defect in the passage complained of. Further, the jury were directed that what happened to the money later was immaterial. In the opinion of this court, what happened to the money later, though by no means conclusive, must have been a relevant circumstance to consider on the question whether W. was acting dishonestly. Accordingly, the appeal would be allowed and the convictions quashed. [H. P.]

Commentary. The criticism made by the court of the summing up is, with respect, difficult to reconcile with the court's own views on the meaning of an intent to defraud as expressed in *R.* v. *Welham* [1960] Crim.L.R. 190; [1960] 2 W.L.R. 333; and since approved by the House of Lords (*The Times*, March 25, 1960). The court, interpreting the same phrase in the Forgery Act, 1913, said: "Provided that the intention is to cause the person deceived to act to his real detriment, it matters not that he suffers no economic loss. It is sufficient if the intention is to deprive him of a right or to induce him to do something contrary to what it would have been his duty to do had he not been deceived." It would certainly have been the Post Office clerk's duty not to hand over the money if he had known the truth. If, then, the accused knew that the signature was forged, he undoubtedly intended to induce the clerk to do something contrary to his duty; and this is an intent to defraud within the court's own definition—unless that phrase bears a different meaning in false pretences from that which attaches to it in forgery. It would be most unfortunate if this were so; yet the present judgment seems to require some further element of " dishonesty " which was not referred to in *Welham*.

The judgment in the present case might be thought to derive some support from *R.* v. *Williams* (1836) 7 C. & P. 354. In that case W. went to the prosecutor's wife and falsely represented that his (W.'s) employer had bought two sacks of malt of her husband and had sent him to fetch them. The wife then gave him two sacks which he took to his employer. It appeared that the prosecutor owed W.'s employer a sum of money which he had declined to pay and that W. had adopted this course in order to enable his employer to procure payment of the debt and so be able to pay W. outstanding wages. Coleridge J. directed the jury: " If in this case, you are satisfied that the prisoner did not intend to defraud [the prosecutor], but only to put it in his master's power to compel him to pay a just debt, it will be your duty to find him not guilty. *It is not sufficient that the prisoner knowingly stated that which was false, and thereby obtained the malt*; you must be satisfied that the prisoner at the time intended to defraud [the prosecutor]."

This certainly suggests that some further element, over and above the requirements stated in *Welham*, is required in false pretences. *Williams* must, however, be considered in the light of *R.* v. *Hamilton* (1845) 1 Cox 244. H., by falsely representing that he was a captain in the Dragoon Guards, had induced the prosecutor to advance money to be invested in a brickmaking enterprise. Ballantine, for the prisoner, said that the money had in fact been invested in a brickfield and, if things had been allowed to take their course, the prosecutor would have received the promised return on his capital. He then submitted, relying on *Williams*, " that the mere fact of making a false pretence, if not for a dishonest purpose, is not a crime within the Act." Pollock C.B., in summing up to the jury, said that he did not fully admit the doctrine that the obtaining of money under false pretences is not a crime, if the defendant does not intend ultimately to cheat the person advancing it. " It is forgery on the part of one who accepts a bill in the name of another, even although he may intend to provide funds to meet it when it becomes due." He distinguished *Williams* on the ground that " the defendant believed, however erroneously, that he had some sort of right to do as he did."

It would appear, then, that the true explanation of *Williams* is that there was evidence of a claim of right made in good faith. No doubt such a claim does negative fraud in both false pretences and forgery; but there was no suggestion of such a claim in the present case. It is therefore submitted, with great respect, that the chairman properly explained the elements of an intent to defraud. It is difficult to follow the remark that the chairman had withdrawn the issue from the jury. The meaning of "intent to defraud" is, no doubt, a question of law; and, in explaining that an intention to achieve certain consequences amounted to such an intent, the chairman was surely not exceeding his proper function, so long as he left it to the jury to decide whether such an intent existed.

FOOD AND DRUGS

Failure to sell to sampling officer—not a "member" or "visitor" within meaning of Licensing (Scotland) Act, 1903—irrelevance

Macmillan v. Lakie

Sheriff Court of Perth and Angus at Perth: Sheriff-Substitute A. M. Prain: July 21, 1959.[7]

Lakie, a barman in a private club, refused to supply whisky to a sampling officer, who was then acting in the execution of his duties under the Food and Drugs (Scotland) Act, 1956. He was charged with obstructing the officer, contrary to section 39 of the Act. It was contended on Lakie's behalf that, by virtue of the Licensing Acts, he was not entitled to supply drink to persons who were neither members nor visitors.

Held, that Lakie was bound to sell the whisky to the officer for the purpose of sampling, and that, in refusing so to do, he was guilty of the obstruction with which he was charged.

Per curiam: "I do not think that in its ordinary reading and in its context [section 84 of the Licensing (Scotland) Act, 1903] can he read as prohibiting the sale to a sampling officer of liquor required for the purpose of sampling." [D. C.]

HABEAS CORPUS

Writ not normally granted to persons in execution

R. v. Governor of Parkhurst Prison, Ex p. Philpot

Queen's Bench Divisional Court: Lord Parker C.J., Hilbery and Pearson JJ.: [1960] 1 W.L.R. 115.[8]

In 1953 P. was sentenced to a term of preventive detention. P. asserted that, before being sentenced, no copy of the Prison

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[7] For the complainer: Procurator-Fiscal, Perth. For Lakie: J. W. Wyllie & Henderson, Perth.

[8] For P.: *Neil Butter* (instructed by the Official Solicitor). For the Governor of Parkhurst Prison: *J. R. Cumming-Bruce* (instructed by the Treasury Solicitor).

Commissioners' report had been given either to him or to his counsel or solicitor; and he now applied to the Divisional Court for a writ of habeas corpus.

Section 21 (5) of the Criminal Justice Act, 1948, provides that "a copy of any report or representations in writing made to the court by the Prison Commissioners for the purposes of the last foregoing subsection shall be given by the court to the offender or his counsel or solicitor."

Held, that section 21 (5) of the Act was directive and not imperative, and that it did not make the handing of such a report to the prisoner a condition precedent to a sentence of preventive detention.

Per Lord Parker C.J.: "It is a well-known principle that this court does not in the ordinary way grant a writ of habeas corpus to persons who are in execution, that is to say, persons who are serving sentences passed by courts of competent jurisdiction."

[D. C.]

Commentary. The court was evidently of the opinion that it had no jurisdiction to entertain the application, and referred to *Re Featherstone* (1953) 37 Cr.App.R. 146, where Goddard L.C.J. said that probably the only case in which the court would grant habeas corpus to a person in execution would be where it was satisfied that the prisoner was being held after the term of the sentence passed on him had expired. Yet if the court had held that section 21 (5) imposed a condition precedent (and such a construction appears by no means impossible) the sentence would surely have been passed by a court which had no jurisdiction to do so.

The construction put upon section 21 (5) was assisted by comparison with the imperative language of section 23 (notice of intention to prove previous conviction) and by a decision of Glyn-Jones J. to the same effect in *Kinally* v. *Home Office*, *The Times*, July 25, 1959.

Principles of Punishment

Sentences in the Court of Criminal Appeal

Prepared by HENRY PALMER, *Barrister-at-Law*

Imprisonment

In R. *v.* WHITFIELD the court (Lord Parker C.J., Donovan and Thesiger JJ.: March 14, 1960) affirmed a sentence of three years' imprisonment in the following circumstances. W., who was a man of twenty-four years of age, had ten previous convictions. W. had been placed on probation at assizes for two offences of shop-breaking and larceny, one of attempted house-breaking and one of simple larceny. About eight months later he was brought back to the assizes for breach of the conditions of the probation order, namely to report to the probation officer weekly and to keep the probation officer informed of any change of address. W. had never reported to the probation officer nor had he notified his changes of address. The probation officer told the assize court that probation had been " completely ignored." The court stated that there was really no option but to affirm the sentence. Any other method of dealing with this case would make a mockery of a probation order. W. had been treated with considerable leniency but a probation order was not equivalent to being let off ; such orders were made to be obeyed. W. had chosen to ignore the hand held out to him and had completely flouted the conditions of the order. He must suffer three years' imprisonment, which was a proper sentence both for the original offences and for the breach.

In R. *v.* COOPER the court (Lord Parker C.J., Donovan and Thesiger JJ.: March 14, 1960) affirmed a sentence of three years' imprisonment. C. had pleaded guilty at quarter sessions to stealing a bicycle. C., who was a man of thirty-five years of age, had eight previous convictions. C. had a history of mental illness and the court, in sentencing him, had said that the sentence of imprisonment was not entirely to punish him but was to protect the public and to give him the mental attention he needed. The court stated that the medical officer from Brixton prison had informed quarter sessions that C. was not suitable for voluntary treatment but needed custodial supervision. In those circumstances three years' imprisonment, which would otherwise have been a very heavy sentence, was perfectly proper and was, indeed, in C.'s own interests.

In R. *v.* LEROY the court (Streatfeild, Donovan and Thesiger JJ.: March 21, 1960) reduced sentences totalling two-and-a-half years' imprisonment to a total of eighteen months' imprisonment. L. had pleaded guilty to conspiracy to defeat the course of public justice and, on another indictment, to forgery and obtaining money by false pretences. L., who was a man of thirty-eight years of age, had two convictions whilst serving in the Royal Air Force, the first twenty years ago of stealing a pair of gloves and the second ten years ago of masquerading in the uniform of a squadron-leader. Despite his service offences he was given a very good character on discharge. The present offence of conspiracy was committed when L., having had an accident while driving his motor-car, failed to stop and later pretended that his car had been stolen, and that he had not been driving at the time of the accident. The offence of forgery was committed by forging a guarantee and another document in connection with a hire-purchase transaction. The offence of obtaining money by false pretences concerned the sale of motor-cars. The court stated that they had considered this man's record. This was the first time he had ever been to prison and the impact of imprisonment on a man with a previous good record was very great. L. had been given a very good character by the Royal Air Force. These were undoubtedly very serious offences but, as an act of mercy, the sentences of six months (for the conspiracy), six months (for the forgery) and eighteen months (for the obtaining by false pretences) would be made to run concurrently instead of consecutively. Accordingly, the appellant would serve eighteen months' imprisonment.

Preventive detention

In R. *v.* FOLKARD the court (Lord Parker C.J., Donovan and Ashworth JJ.: March 7, 1960) varied a sentence of seven years' preventive detention to one of eighteen months' imprisonment. F. had pleaded guilty at a magistrates' court to larceny in a dwelling-house and had been sentenced by quarter sessions. F., who was a man of thirty-three years of age, had eight previous convictions. The present offence was committed when F., who had been lodging with his brother, took £32 belonging to his brother. Three other offences were taken into consideration, namely stealing a motor-cycle which F. had on hire-purchase, obtaining a motor-car by falsely pretending that the motor-cycle was his property and stealing a tape recorder. The court stated that, although the sentence of preventive detention was justified by F.s record there was another side to the matter. After F.'s release from his last sentence of imprisonment in March 1959 he had apparently met a girl who was anxious to marry him despite his past; and it was she who had made F. give himself up to the police for this theft of £32 in order that they should be able to start life square, as it were. The probation officer had reported: "Quite frankly, I feel that he is not such a menace as his record may indicate . . ." and said that, in his opinion, F. had found an incentive for better behaviour in the love of this young woman. This court felt that in those circumstances they ought to give F. another chance and they were prepared to substitute a sentence of eighteen months' imprisonment for the sentence of preventive detention.

In R. *v.* JACKSON the court (Lord Parker C.J., Donovan and Ashworth JJ.: March 7, 1960) varied a sentence of eight years' preventive detention to one of eighteen months' imprisonment. J. had pleaded guilty to shop-breaking and sentenced by a Crown court. J., who was a man of thirty-three years of age, had nine previous convictions. The present offence was committed when J. broke into a shop and stole £18 worth of cloth and other goods. This offence was committed five months after his last release from prison. The court stated that the Crown court had been informed that J. had not been in employment prior to his arrest, having been dismissed for bad time-keeping. It now appeared that J. had been employed for four months and, so far from being dismissed for bad time-keeping, had left because his employers had been unable to provide any overtime work. His employers had written to this court and said that he "worked with extreme diligence during his employment here, and at all times was willing, obedient and conscientious, in fact, one of the best chaps we have had employed on this type of work." J. had done good work for a short period and, on the whole, this court thought that they would be justified in giving him one more chance. This would be his last chance, but the sentence would be reduced to eighteen months' imprisonment with an order under section 22 of the Criminal Justice Act, 1948.

In R. *v.* SMART the court (Lord Parker C.J., Donovan and Pearson JJ.: February 8, 1960) reduced a sentence of eight years' preventive detention to one of imprisonment for two years. S. had pleaded guilty at a Crown court to factory-breaking and stealing twenty-seven yards of carpet. S., who was a man of forty-nine years of age, had twenty-one previous convictions. In 1953 he had been sentenced to three years' imprisonment for store-breaking and larceny and in 1956 to two years' imprisonment for another offence of larceny. He was released from this last sentence in September

1957. The court stated that, although this had not appeared in evidence at the Crown court, S. had not only kept out of trouble since September 1957 but had been working. S.'s employer for the period prior to the committal for trial had written in on his behalf. S. had shown that for two years he could run straight and do an honest job of work so that, on this occasion, preventive detention was the wrong sentence. The appropriate sentence was one of imprisonment for two years but the appellant had better look upon this as his last chance.

In R. *v.* ALLEN the court (Lord Parker C.J., Donovan and Thesiger JJ.: March 14, 1960) affirmed a sentence of seven years' preventive detention. A. had pleaded guilty at quarter sessions to burglary. A., who was a man of seventy-three years of age, had nineteen previous convictions. The court stated that they had said on many occasions that a sentence, particularly of preventive detention, imposed upon an elderly person should not be of such length as would result in the prisoner dying in prison. A. looked a good deal younger than his age and, further, he had nowhere to go, no relatives, no money and no prospect of a job. In many ways he was better off in prison. This court could not say, in these circumstances, that the sentence of seven years' preventive detention was wrong in principle and, accordingly, that sentence would be affirmed.

In R. *v.* BROWN the court (Streatfeild, Donovan and Thesiger JJ.: March 21, 1960) reduced a sentence of ten years' preventive detention to one of seven years' preventive detention. B. had pleaded guilty at a magistrates' court to stealing an oven and other metal articles from derelict buildings. He was sentenced by a Crown court. B., who was a man of sixty-one years of age, had thirty previous convictions. The court stated that they would, if it were at all possible, lean against a sentence of ten years' preventive detention in the case of a man of sixty-one years of age. Having regard to the gravity of the offence and to his age, they had concluded that ten years was excessive and, accordingly, the sentence would be reduced to one of seven years' preventive detention.

Probation

In R. *v.* CLEVERLEY the court (Lord Parker C.J., Cassels and Ashworth JJ.: February 1, 1960) varied a sentence of three years' imprisonment to one of probation. C. was convicted at assizes of wounding with intent to cause grievous bodily harm. C., who was a man of thirty-two years of age, was previously of good character. The present offence was committed when C.'s fiancée told him that she was finished with him. C. bought a knife and some tablets containing strychnine, intending to kill both his fiancée and himself. In fact he struck his fiancée a single blow with the knife which inflicted a flesh wound near the eye. No permanent injury was done. The jury acquitted of wounding with intent to murder. C. had suffered from mental trouble from an early age. The court, after hearing further medical evidence, stated that the sentence of imprisonment should be set aside and that C. should be placed on probation for three years with a condition under section 4 of the Criminal Justice Act, 1948, that he should reside at a mental hospital for twelve months. The court had no power under the Act to make the condition of residence for a longer period and they looked to the appellant himself and to his parents to arrange the continuance of treatment for as long as necessary.

Acts and Orders*

Agriculture

This Order consolidates with one amendment all previous Orders made under section 9 (2) of the Agriculture (Poisonous Substances) Act, 1952, extending the application of the Act to substances in respect of which the Minister of Agriculture, Fisheries and Food and the Secretary of State for Scotland are satisfied that their use in agriculture involves substantial risk of poisoning to agricultural workers.

The amendment consists of an addition to the lists of substances to which the Act is extended of all substances the molecular structure of which consists of a bridged six-membered ring with substituents in the ring—these (*inter alia*) including the substance having the common name of endrin, which was the subject of a previous Order. The Order is a pre-requisite to the making of amendment regulations under the Act so as to protect workers against risks of poisoning in connection with the use in agriculture of the substances to which the Act is now, for the first time, extended. Operative March 18, 1960. AGRICULTURE (POISONOUS SUBSTANCES) (EXTENSION) ORDER, 1960 (S.I. No. 398) (3d.).

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* Prepared by F. Maurice Drake, *Barrister-at-Law*.

British Commonwealth

This Order sanctions the making of an agreement between the Colonies of Antigua and Saint Christopher Nevis and Anguilla for the removal of prisoners from Saint Christopher Nevis and Anguilla to Antigua, and for their return. COLONIAL PRISONERS REMOVAL (ANTIGUA AND SAINT CHRISTOPHER NEVIS AND ANGUILLA) ORDER IN COUNCIL, 1960 (S.I. No. 438) (2d.).

London Traffic

The following Orders have been made detailing prescribed routes: S.I. Nos. 359 (Brentford and Chiswick) (2d.); 367 (Islington) (2d.); 391 (Greenwich) (2d.); 419 (Reigate) (2d.); 433 (Chislehurst and Sidcup) (2d.). The following Orders have been made prohibiting waiting: S.I. Nos. 312 (Walton and Weybridge) (3d.); 360 (Westerham, Kent) (3d.).

The London (Waiting and Loading) (Restriction) Regulations, 1958 (S.I. No. 660), as amended, are further amended. The main changes are that the restrictions with regard to waiting, loading and unloading, and on the use of vehicles for the purposes of advertisement in certain streets are wholly or partly applied to certain streets or parts of streets in Chelsea, Esher, Hendon, Holborn, Ilford, Orpington, Penge, Radlett, St. Marylebone, Westminster, Willesden, Woolwich, and the City of London. Operative March 6, 1960. LONDON (WAITING AND LOADING) (RESTRICTION) (AMENDMENT) REGULATIONS, 1960 (S.I. No. 313) (6d.).

For penalties for contraventions see regulation 15 of the principal Regulations (S.I. 1958, No. 660).

Five additional parking places on highways in the Borough of St. Marylebone have been designated as places at which the borough council may make charges for vehicles authorised to be left there during the permitted hours, and the provision of the principal Order (S.I. 1959, No. 429) is applied to those places. Operative April 4, 1960. PARKING PLACES (ST. MARYLEBONE) (No. 1, 1959) (AMENDMENT No. 3) ORDER, 1960 (S.I. No. 385) (3d.).

The provisions of the principal Order (S.I. 1958, No. 659) which prohibit vehicles being used in certain streets between specified hours for the collection of refuse and carrying exceptional loads, are extended to certain additional streets or parts of streets in the London Traffic Area. The streets concerned lie in the Boroughs of Hammersmith, Shoreditch, Fulham, Deptford, Greenwich and Wandsworth. Operative March 20, 1960. LONDON TRAFFIC (MISCELLANEOUS PROHIBITIONS AND RESTRICTIONS) (AMENDMENT) REGULATIONS, 1960 (S.I. No. 395) (3d.).

For penalties for contraventions see regulations 6, 9, 12, 14 and 18 of the principal regulations (S.I. 1958, No. 659).

Scotland

The method of apportioning amongst local authorities the expenditure in training probation officers is altered. The effect is that this expenditure will now be shared in proportion to each authority's expenditure on the probation service. Operative February 5, 1960. PROBATION GRANT (DEDUCTIONS) (SCOTLAND) AMENDMENT REGULATIONS, 1960 (S.I. No. 309) (3d.).

The salaries of all senior, deputy principal and principal probation officers in Scotland are increased, with effect from December 1, 1959. PROBATION (SCOTLAND) AMENDMENT RULES, 1960 (S.I. No. 406) (3d.).

It is provided that one-half of the expenses incurred by the Secretary of State on certain common police services shall be recoverable from police authorities and joint police committees. The services concerned are the Police (Scotland) Examinations Board, which conducts promotion examinations for the Scottish police, the representative and negotiating machinery for the police service and the Scottish Criminal Record Office which maintains central records of criminal convictions, etc., in Scotland. Operative April 1, 1960. POLICE (COMMON POLICE SERVICES) (SCOTLAND) ORDER, 1960 (S.I. No. 370) (2d.).

It is no longer required that when police forces send finger or palmar prints to New Scotland Yard for registration or search, copies should be sent to the chief constable of Glasgow. Operative April 1, 1960. POLICE (SCOTLAND) AMENDMENT REGULATIONS, 1960 (S.I. No. 369) (2d.).

Witnesses

Increases are made in the allowances or maximum allowances payable under the Costs in Criminal Causes Act, 1952, to persons attending to give evidence in those criminal cases to which the Act applies. Operative March 1, 1960. WITNESSES' ALLOWANCES REGULATIONS, 1960 (S.I. No. 228) (3d.).

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 11 New Fetter Lane, London, E.C.4." The questions of readers only are answerable in the Review. All questions should be submitted in triplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

68. *Production of driving licence in court*

A difficulty arose recently at quarter sessions which you may consider raises an interesting point, and on which I should appreciate your views.

A man was convicted on indictment under section 9 of the Road Traffic Act, 1956, of being in charge of a motor-vehicle when under the influence of drink and being unfit to drive. The accused person had previously been convicted for a similar offence under section 15 of the Road Traffic Act, 1930, so that the provisions of subsection (2) of section 9 of the 1956 Act applied and he was disqualified for a period of two years for holding or obtaining a driving licence, and the court ordered his licence to be endorsed. The accused did not, however, produce his driving licence in court, and unfortunately the court failed to make an order for the subsequent production of the licence, and several weeks elapsed before the licence could be obtained.

I have not been able to find any provision in the Road Traffic Act, 1956, which applies section 33 (3) of the Road Traffic Act, 1934, to offences committed under section 9 of the Road Traffic Act, 1956, and I am wondering whether this is an oversight. If section 33 does not apply, then presumably the only way of obtaining a licence is for the court to make an order under section 8 of the Road Traffic Act, 1930, requiring the licence to be produced. The court having failed to do this at the time of convicting the accused, it would appear that they cannot make an order subsequently under section 8 and therefore if the accused fails to produce his licence, there is nothing that can be done about the matter.

It seems to me that as the provisions of section 33 of the 1934 Act apply to offences committed under sections 11, 12 and 15 of the 1930 Act, they should also apply to offences under section 9 of the 1956 Act. Incidentally, the provisions of section 33 (3) of the 1934 Act are not clear as to the court to which the licence should be delivered. If the provision merely applies to the Magistrates' Court it is ineffective in the case of a defendant electing to go for trial, as the defendant is entitled to have his licence back as soon as the preliminary hearing is over. Is it your view that the section is wide enough to include production of the licence to the Clerk of the Peace or the Clerk of Assize in a case where a defendant is sent for trial? Section 8 of the 1930 Act does not apply to cases where the provisions of section 33 (3) of the 1934 Act are applicable, so it is important that the clerk of the trial court shall make sure that he has the driving licence in his possession before the trial commences. If the licence be not so produced, presumably proceedings would have to be commenced subsequently against the defendant on a charge of failing to produce the licence as required by that section. [C. P.]

ANSWER

I do not think it was by oversight that section 33 (3) of the Road Traffic Act, 1934, was not applied to offences committed under section 9 of the Road Traffic Act, 1956.

Section 33 (3) of the 1934 Act is expressly made to apply only to speeding convictions and offences under sections 11, 12 and 15 of the 1930 Act.

Section 6 of the amended 1930 Act empowers any court before which a person is convicted of any offence specified in the Fourth Schedule to the 1956 Act to order that that person's licence shall be endorsed; and one of the offences specified in the Fourth Schedule is section 9 of the 1956 Act.

Section 8 of the amended 1930 Act then makes provision for the court to order production of the licence where it has ordered it to be endorsed.

I am inclined to agree with the view that the court, having failed at the time of conviction to order the offender to produce his licence, then had the authority later to order him to do so. That the wording of section 8 (2) is not wholly clear on this and I think it at least arguable that the court of conviction could *at a later date* still require production of the licence, provided that licence had at the time of conviction been held by the offender.

As to your second query I think that there can be no doubt at all that in both section 8 of the 1930 Act and section 33 of the 1934 Act, the court of conviction is empowered to require production of the licence, and it is quite immaterial whether that court be a magistrates court, quarter sessions or assizes. [M. D.]

Books and Periodicals

Book reviews:

Show Me a Lawyer. By Peter Bryan. London: Michael Joseph. 1960. 223 pp. 15s. net.

This fictional account of a solicitor's first two years after admittance is a brave attempt at doing for solicitors what Henry Cecil did for barristers in *Brothers in Law.* Its failure lies in that, whereas the background of life in chambers was well drawn in the latter, providing a stable background for the antics of the newly called barrister, no clear picture of life in a solicitor's office emerges from the present book and one's interest is hardly held by the improbable characters and their equally improbable behaviour. There is one outstanding exception: the delightful Mr. McCrombie who appears in the later part of the book, whose presence stabilises the office in which he lives.

A. L. N.

Books received:

William Ewart, M.P. By W. A. Munford. London: Grafton & Co. 1960. 193 and (index and biblio.) 14 pp. 25s. net.

Criminal Law: Leading Cases in a Nutshell. By D. W. Elliott. London: Sweet & Maxwell. 1960. 204 and (index) 3 pp. 10s. 6d. net.

Readers' digest:

Magistrates: Problems of a stipendiary magistrate: 28 *Medico-Legal Journal* 17.

Misprision of felonies: Based on *R.* v. *Wilde, Ward Woolley*: 68 *Police Review* 240.

Penology: Corporal punishment: juvenile delinquents: 16 *The Magistrate* 33.

Practice and procedure: Extension of time to state a case: 110 *Law Journal* 186.

Road traffic: Causing death by dangerous driving: 124 *Justice of the Peace* 183.

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1960

Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review,* 11 *New Fetter Lane, E.C.*4. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

THE
CRIMINAL LAW REVIEW

June 1960

Traffic and safety

We mentioned last month the Government's Road Traffic and Roads Improvement Bill. The clause providing for " ticket fines " in the case of a limited group of minor traffic offences has been approved by the House of Commons Standing Committee, but is disapproved, apparently, in police circles. Many policemen doubt the general wisdom of what has been called the " on-the-spot " fining system. This terminology somewhat misrepresents the proposed system. The clause does not provide that the police may levy fines " on the spot ", but merely enables them to give to the driver a notice offering him the option of paying a fixed penalty within a stated period without being prosecuted. Nothing in the provision need affect the existing practice of proffering an " on-the-spot " warning or of sending merely a warning if the penalty is not paid; though it is true that the police may be encouraged by the existence of their new power to give a " ticket " when they would formerly have given a warning, knowing that frequently no prosecution will be called for because the penalty will be paid. Careful instruction of constables as to the manner in which they should exercise their altered discretion will be needed. If the police fear an impairment of their relations with the motoring public, the answer seems to be that it will be in their hands to work the system with common sense and moderation.

Traffic congestion is the principal concern of the Road Traffic and Roads Improvement Bill. Recently the public has been reawakened to the allied question of road safety. The Press gives special publicity to traffic conditions at holiday periods. This Easter a dramatic emphasis was placed upon the mortality and accident figures, and many people must have been newly shocked into some appreciation of the size of the problem. An exhaustive debate in the House of Lords on May 4 fully demonstrated the complexity of the subject in both its social and its legal aspects. Of the many points emerging from this debate we would mention two. One is the inevitable inadequacy of law and law enforcement in the context of road safety. No matter what the deterrent sanctions (disqualification, fine, imprisonment), the mere existence of penal provisions cannot be expected to prevent momentary lapses of attention, errors of judgment, over-confidence, impatience, or other exhibitions of sheer human weakness. Magistrates and lawyers may feel that the part they have to play in this field is insignificant beside that of the educators of both driving and non-driving public and those who are responsible for the improvement of the roads themselves.

The second point is that several peers called for more frequent disqualification, even for automatic disqualification on a first conviction of dangerous driving. It is true that some courts could well disqualify drivers more often than they do. But perhaps we should pause before we deal more harshly than at present with those who are convicted of dangerous or careless driving. First, the acts for which they are punished are a tiny minority of all the acts of bad driving that occur. It is sheer chance whether a driver is prosecuted, the chance usually turning on the occurrence of an accident. Secondly, at present dangerous driving requires no *mens rea*, no blameworthy state of mind.[1] Was the driving *in fact* dangerous in the circumstances? That is the test. How many of us can say that we have never been guilty of this offence? There may be a case for a clear distinction in law between reckless driving and dangerous driving, and for more frequent prosecutions for the former, with disqualification for *that* offence on a first conviction.

Corporal punishment

Since the passing of the Criminal Justice Act, 1948, abolishing corporal punishment, there have been agitations for its reintroduction. A great deal has been said on the subject, and now the Lord Chief Justice, Lord Parker, has made his position in the controversy clear. In his address to the National Association of Probation Officers he said that he hoped the Advisory Council on the Treatment of Offenders would find that the " balance of advantage " now lay in favour of reintroducing corporal punishment in a limited form. Lord Parker has now been invited to give evidence to the Council.

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[1] See *Hill* v. *Baxter* [1958] 1 Q.B. 277.

Mr. Justice Barry, the chairman, in a letter to the *Economist* of April 30 says that a number of organisations have already been asked to give evidence; he goes on, " but we think there may be other organisations as well as private individuals whose views would be of some help to us in reaching our conclusions. If any of your readers would like to help the Council in this way I should be grateful if they would send a brief statement of their views to the secretary of the Advisory Council on the Treatment of Offenders."

Telephone tapping in Australia

The Attorney-General of Australia, Sir Garfield Barwick, has introduced a Bill into the Australian House of Representatives which is intended to prohibit the interception of messages over the telephone, except in two closely defined situations. A warrant from the Attorney-General, authorising interception on a specific telephone, would have to be obtained. Penalties of £A500 (£400) or two years' imprisonment are proposed for breaches of the prohibition or divulging information obtained. This would have the effect of making it illegal *per se* to listen in on any telephone conversation without special permission from the Attorney-General.

The Bill is obviously going to cause a great deal of controversy and is at this moment being opposed by the Australian Labour Party.

It seems that in this country, subject to any liability that might arise out of the publication of the transcript, that the interception of telephone conversations is lawful.[2] The practice is to comply with the recommendations of the Privy Council Committee,[3] that the interception of telephone conversations should be most stringently regulated, and that the information acquired should be rigorously confined to the purposes which convinced the Home Secretary that it was right to issue the warrant in the first place.

Open Borstals

The Government have approved a proposal by the Prison Commissioners to establish an open borstal for approximately 250 boys at a disused military hospital at Shaftesbury, Dorset.

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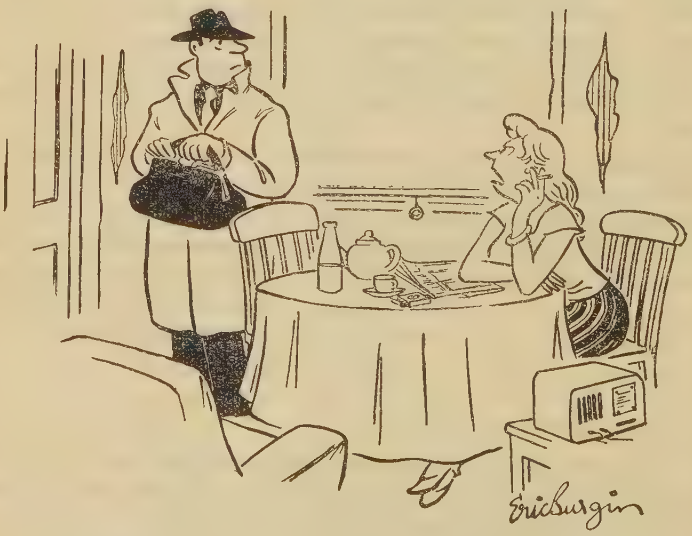
[2] [1957] Crim.L.R. 502, 508.

[3] October 1957, Cmnd. 283.

Judicial appointments

Mr. Lancelot Elliot Barker, a solicitor, has been appointed a Metropolitan Magistrate.

Mr. Guy Holford Dixon has been appointed Deputy Chairman of the Court of Quarter Sessions for the County of Leicester.



". . . and for goodness sake don't get caught—I haven't got a single decent thing I could wear to your trial."

The Functions of the Judge and Jury with Regard to Confessions

By RUPERT CROSS, D.C.L.

The purpose of this article is to consider the decisions in *R.* v. *Hammond*[1] and *R.* v. *Bass*.[2] Each of them has been subjected to a certain amount of criticism, and the criticism is rendered all the more interesting by the fact that much of it comes from the courts of the Commonwealth. The legal and procedural background of the two cases need only be stated very briefly. They were both concerned with the admissibility of a confession.

The law and practice with regard to confessions

To quote Lord Sumner, " It has long been established as a positive rule of English criminal law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority."[3] It is the settled practice for the judge to decide whether a confession was voluntary after hearing evidence in the absence of the jury. If the judge decides that the confession is admissible, the evidence upon which he reached that conclusion may have to be heard by the jury as they are concerned with the admissibility of the confession. In *R.* v. *Murray*,[4] for instance, a conviction was quashed because the Recorder had refused to allow the accused's counsel to cross-examine with regard to the circumstances in which a confession had been made, and told the jury to accept from him that the confession was a voluntary one, obtained without duress, bribe or threat. When delivering the judgment of the Court of Criminal Appeal Lord Goddard C.J. said " It has always, as far as this court is aware, been the right of counsel for the defence to cross-examine again the witnesses who have already given evidence in the absence of the jury; for if he can induce the jury to think that the confession was obtained through some threat or promise, its value will be enormously weakened. The weight and value of the evidence are always matters for the jury."

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[1] (1941) 28 Cr.App.R. 84.

[2] [1953] 1 Q.B. 680.

[3] *Ibrahim* v. *R.* [1914] A.C. 599, at p. 609.

[4] [1951] 1 K.B. 391.

Although the same evidence may often have to be heard twice, once in the absence and once in the presence of the jury, it is investigated with a different object in view on each occasion. The judge simply has to decide whether the confession was voluntary, the jury simply have to decide whether the confession is true. Can the truth of a confession ever be relevant at a judicial inquiry into its voluntary character? and is the fact that a confession was not voluntary conclusive of an issue concerning its truth? These are the questions raised by *R.* v. *Hammond* and *R.* v. *Bass* respectively.

R. v. Hammond

Hammond was charged with murder. He alleged that a confession had been obtained from him by violence. He gave evidence to this effect in the absence of the jury and was asked by counsel for the prosecution whether the confession was true. He said "yes," and stuck to this amazing reply in the face of further questions designed to make it quite clear that he understood what he was saying. The judge ruled that the confession was admissible, Hammond did not give evidence before the jury and he was convicted. The sole point of his appeal was whether the question put to him concerning the truth of the confession was admissible, and the Court of Criminal Appeal held that it was. According to Humphreys J. who delivered the judgment of the court, it was a perfectly natural question to put because it went to the credit of the appellant as a witness. Humphreys J. also considered the question to be directly relevant to the issue whether the confession was voluntary. "If a man says 'I was forced to tell the story, I was made to say this, that and the other,' it must be relevant to know whether he was made to tell a number of things which were untrue. In other words, in our view, the contents of the statement which he admittedly made and signed were relevant to the question of how he came to make and sign that statement."

Let it be granted that, in the ordinary case, the fact that a witness is a self-confessed murderer is relevant to the question whether he is the kind of man whose oath ought to be believed, it is doubtful if this is so when the statement to which he swears is that he was forced to confess that he was a murderer. The distinction between cross-examination to credit and cross-examination to the issue hardly seems to be applicable to such a situation. There is therefore much force in the criticism of *R.* v. *Hammond* made by the Lord Chief Justice of the Saskatchewan Queen's Bench when he said "I do not see how, under the guise of credibility, the court can transmute what is initially an inquiry as to the admissibility of the confession into an inquisition of the accused." [5]

Can the question be justified as cross-examination to the issue of admissibility? The answer depends on whether a true confession is more likely to have been made voluntarily than a false one, and the solution of this problem is affected by the meaning of "voluntary" in the context of the law relating to the admissibility of confessions. If, according to that law, a confession were voluntary unless it was made under a very great deal of pressure, a true confession might be more likely to be voluntary than a false one, simply because less pressure is required to induce it. This is a debatable question, but it does not arise because it is not the case that under English law a confession is voluntary unless made under a great deal of pressure. The mere use of such words as "you had better tell the truth" appears to imply a threat or inducement to confess,[6] and, when such a small amount of pressure prevents a confession from being voluntary, it is difficult to see how it can be maintained that a true confession is any more likely to be voluntary than a false one.

When the judge hears witnesses on the *voir dire* in the absence of the jury, he is not bound by the rules of evidence to the same extent as a court before which the actual trial is conducted. Nevertheless there does appear to be a good deal of question begging in treating the contents of a confession as evidence on the preliminary issue concerning its voluntary character. This point was put with great clarity by O'Halloran C.J. speaking for the British Columbian Court of Appeal after considering *R.* v. *Hammond*. "As I understand the trend of decision in Canada," he said, "a confession is not evidence until the trial judge decides that it is voluntary and admits it as evidence, and also that the object of a trial within the trial is to discover not whether the confession is true, which is for the jury alone, but whether it is voluntary and hence admissible in evidence." [7]

It is questionable whether any particular injustice is likely to be occasioned by decisions such as *R.* v. *Hammond*, but the implications of the case suggest that it might advantageously be reconsidered by the Court of Criminal Appeal, if a suitable occasion should arise. One implication mentioned by Sir Fred Pritchard in the Common Callender [8] is that if, on facts such as those of *R.* v. *Hammond,* the accused should give evidence in the presence of the jury, he may be asked in cross-examination about the admission made in the presence of the judge a short time earlier. Indeed it is difficult to see why someone who has been present at the proceedings before the judge should not prove the statement that the confession was true as an admission against the accused. The procedure of the trial within the trial designed to protect the accused from prejudicial disclosures to the jury may thus be allowed to operate to his disadvantage. If the accused had not raised the issue of the voluntary character of his confession in the absence of the jury, the prosecution would have gone before that body with one less item of evidence in chief against him. If, in such a case, the judge were to rule in the absence of the jury that the confession was not voluntary, would the discretion which he possesses with regard to the admissibility of evidence at a criminal trial enable him to prevent the prosecution from giving evidence or cross-examining in the presence of the jury with regard to the accused's admission that the confession was true? If not, the proceedings before the judge would be robbed of all point.

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[5] *R.* v. *Hnedish* (1959) 29 C.R. 347, at p. 350.

[6] *R.* v. *Jarvis* (1867) 1 C.C.R. 96.

[7] *R.* v. *Weighill* (1945) 2 D.L.R. 471, at p. 474.

[8] pp. 88–89.

Finally, if cross-examination concerning the truth of a confession is directly relevant to the issue of its voluntariness, why should the prosecution not be at liberty to call witnesses to the guilt of the accused at the hearing before the judge? If this were permitted, a trial within the trial would become a very elaborate affair.

R. v. Bass

Bass successfully appealed to the Court of Criminal Appeal against convictions for larceny and shopbreaking because they were based on a confession which had been obtained without a caution while he was in custody. There had thus been an infringement of rule 3 of the Judges' Rules. It is of course well settled that the judge has a discretion whether to admit a confession made in these circumstances, but, in the instant case, the judge had not exercised that discretion because he thought there had been no infringement of the Judges' Rules.

Bass also alleged that he had made his confession in consequence of various promises held out to him by the police, and a further reason given for allowing his appeal was that the judge had failed to direct the jury to acquit if they were not satisfied that the confession was made voluntarily. It is arguable that, on this point, *R.* v. *Bass* does not go any further than *R.* v. *Murray,*[9] but the language used by Byrne J. in delivering the judgment of the Court of Criminal Appeal is susceptible of, and has received, a far broader construction. After referring to the words of Lord Sumner quoted at the beginning of this article Byrne J. said " It is to be observed, as this court pointed out in *R.* v. *Murray*, that while it is for the presiding judge to rule whether a statement is admissible, it is for the jury to determine the weight to be given to it if he admits it, and thus, when a statement has been admitted by the judge, he should direct the jury to apply to their consideration of it the principle as stated by Lord Sumner, and he should further tell them that if they are not satisfied that it was made voluntarily, they should give it no weight at all and disregard it."[10] The court's final observation on the conduct of the judge with regard to the confession was that he omitted to tell the jury in plain words that " Unless they were satisfied that it had been made voluntarily they should reject it and—in view of the fact that it was the only evidence against the appellant—acquit him."

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[9] [1951] 1 K.B. 391, *supra.*

It is hardly surprising that these passages should have been thought to warrant the suggestion that the jury may disregard a confession, even though they believe it to be true, if they come to the conclusion that it was not voluntary—a conclusion which must, *ex hypothesi*, flatly contradict the opinion previously formed by the judge. This was the construction placed upon the words of Byrne J. by the High Court of Australia in *Basto* v. *R.*,[11] and their criticism of *R.* v. *Bass* is worth quoting at length. " A confessional statement may be voluntary and yet to act upon it might be quite unsafe; it may have no probative value. Or such a statement may be involuntary and yet carry with it the greatest assurance of its reliability or truth. That a statement may not be voluntary and yet according to circumstances may be safely acted upon as representing the truth is apparent if the case is considered of a promise of advantage being held out by a person in authority. A statement induced by such a promise is involuntary within the doctrine of the common law but it is plain enough that the inducement is not of such a kind as often would be really likely to result in a prisoner's making an untrue confessional statement." After citing the relevant parts of the judgment in *R.* v. *Bass*, the opinion of the High Court of Australia continued: " With all respect this cannot be right. The admissibility of evidence is not for the jury to decide, be it dependent on fact or law, and voluntariness is only a test of admissibility." [12]

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[10] [1953] 1 Q.B. at p. 684. It seems from the report of *R.* v. *Cowell* (1940) 27 Cr.App.R. 191, at p. 192, that Hilbery J. would have disapproved of such a direction. According to the report of *R.* v. *Cowell* in [1940] 2 K.B. 49, Humphreys J. left it to the jury to say whether the accused's confession was voluntary, a fact which is not made plain in the *Criminal Appeal Reports*, although the point is mentioned in the account of the arguments of counsel and Hilbery J. is reported to have said " But that was more than the appellant was entitled to: it gave him an extra chance of escape." There can have been little doubt of the truth of the confession in *R.* v. *Cowell* because it referred to matters of which no one but the criminal could have been aware.

[11] (1954) 91 C.L.R. 628.

Recent English cases

The principal reason why this article has been written is that, in recent cases in which the accused made a confession, the Court of Criminal Appeal has again said that the jury should have been directed that, if they were not satisfied that the statement was free and voluntary, they should reject it *in toto*.[13] If taken at their face value, statements of this sort suggest that, in cases in which the principal item of evidence against the accused is a confession, the jury must acquit although fully satisfied that the confession was true, if they are not satisfied that it was voluntary. If it really is the law that a jury should be told that they must return a verdict of not guilty though satisfied of the accused's guilt beyond reasonable doubt, there must be many who would say that the protection of the accused is carried to some strange excesses in twentieth-century England. Their uneasiness is not likely to be completely removed by the reflection that, in parts of the United States, both judge and jury may be called upon to pronounce upon the voluntary character of a confession in the same case.[14] The role of the jury and its relations with the judge are so different in the United States from what they are in England that a comparison of the procedure in the two countries with regard to the admissibility of a confession may not be particularly helpful.

It is of course highly desirable that everything possible should be done to discourage the slightest deviation from the proper methods of taking statements from those accused of crime, and this justifies the rejection by the judge of involuntary confessions regardless, in some instances, of their probable truth, but the case for a double check involving the possible contradiction of the conclusion of a trained judge by an untrained jury is infinitely weaker. If the dangers against which the law concerning the admissibility of confessions is intended to guard are so great as to necessitate this double check, it is for consideration whether it would not be wiser to reject all confessions made to persons in authority. Many people might consider this to be an unwise and extreme step, but to tell an English jury that they must not act on an involuntary confession, however technical the reasons for its voluntariness may be, and however deeply they are convinced of its truth, is to court disaster, if only because it is likely to bring the law into contempt.

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[12] At pp. 640–641. In addition to deciding whether a confession was true, the jury may, in the very exceptional case in which the point is taken, have to decided whether an alleged confession was made after the judge has ruled in their absence, that there is sufficient evidence of the making of the confession to leave to them. But this is hardly a question of admissibility (see *R.* v. *Robers* (1953) 37 Cr.App.R. 86 at p. 94).

[13] *R.* v. *Sutherland and Johnson* [1959] Crim.L.R. 440. See also *R.* v. *Francis and Murray* (1959) 43 Cr.App.R. 174.

[14] 48 *Journal of Criminal Law and Criminology* 59.

Conclusion

The cross-examination approved in *R.* v. *Hammond* tends to embarrass the conduct of an inquiry into the voluntary character of a confession, and the form of direction to the jury which was commended in *R.* v. *Bass* is based either on the erroneous assumption that an involuntary confession must be untrue or else on the novel proposition that the admissibility of evidence may be the concern of the jury. These are two of the many instances in which lawyers of the mother country may have something to learn from the Commonwealth.

Prosecuting Officer

By CHRISTOPHER WILLIAMS

Conclusion

" Now, think, please, Miss Feather," said Inspector Newman coaxingly. " There's nothing at all to get upset about. Just listen to the question, and answer it carefully. I'll put it to you again. Now, you've told the court that it was your job, as senior assistant at the shop, when the manager was away for any reason at closing time, to shut the front door of the shop, see the shop was tidy, enter the amount of the cash in the till in the cash book, see the other assistants out, see the back window was securely shut, turn off the lights at the main, and then let yourself out and lock the back door, and go home. That was your usual practice. Now, what exactly happened on the evening of Monday, the fourth of April? "

" Like I've just said," replied the girl, insolently tracing a pattern with her forefinger on the edge of the witness box. From the dock, the young prisoner glared silently at her. " Same as any other night. Wasn't no different, I tell you. The manager wasn't back, so come six o'clock, I shut the front door, counted the cash—there was eighty-one pounds and some silver—tried to fix the window, but the catch was stiff and it wouldn't shut, not properly. Then, when Charlie'd gone out the back door, I turned the lights out and went out myself, locked the back door, and put the key in my pocket."

Contradictory statement

She looked across at Charlie in the dock, who was smiling slightly. Newman scratched his head. Something adrift somewhere, he told himself. Once again he glanced at the statement in his hand. Plain enough, he muttered to himself. "*I was in a hurry last night*," he read, "*and so I gave Charlie the key so he could lock up. I left him there washing or something. He was still in the shop when I went out the back door. He brought the key round to our house about seven.*" Girl must be dotty or something; mixing up the dates, perhaps. Better try again, he thought.

"Miss Feather," he said, in a sharp tone. "I want you to tell the court what in fact happened on the evening of the fourth of April—a Monday, and the day before the police came round to the shop to see you—remember? "

"I've already told you twice," burst out the girl, her sullen face lighting up for a moment into something like emotion. "Why do I have to keep on telling you? "

Newman thought for a moment. Awkward, he mused. Flat contradiction; deliberate, too, he felt sure. What to do? Hostile witness? Never had one before. Maybe just muddled; certainly not a very bright type. Still, there's the flat contradiction. He looked across at Detective Constable Perks, who was savagely chewing the ends of his moustache, and frowning alarmingly. Newman beckoned him across. "She off her rocker? " he whispered. Perks shrugged his shoulders. Ah, well, thought Newman, better get it sorted out somehow. Do I give her the statement or do I hand it to the beak? he asked himself. Then he remembered.

"Your worships," he began, "I would draw your attention to this statement. I would like to question the witness about it." And he handed the typewritten sheet to the Clerk, who glanced at it for a moment, and then passed it up to the Chairman. The Chairman adjusted his glasses and frowned at the statement for a minute or so, and then nodded to Newman.

"Now, then, Miss Feather," Inspector Newman began. "Do you remember the detective officer coming to the shop at the request of the manager on the morning of Tuesday, the fifth of April? "

The witness nodded.

" And did the officer take a statement down in writing at your dictation about the events of the previous evening, and did you read the statement over and sign it as being correct? " asked Newman.

" Yes."

" And in that statement did you tell the officer that you had been in a hurry the night before, and had given the key of the shop to the prisoner so that he could lock up, and that you had then gone home, leaving the prisoner in the shop? And that the prisoner had brought the key round to your house later that evening? Did you say those things? " asked the Inspector.

The witness glanced across at the prisoner, who was glaring at her ferociously. She nodded.

" That won't do, I'm afraid, Miss Feather," said Newman. " You must tell the court clearly whether you did or not."

" Well, yes, then ; I did," replied the witness sullenly.

" Why? " rapped Newman.

" Why what? " queried the girl pertly.

Newman bit his lip. Serve him right for trying to hurry too much. Better start again.

" On the morning the crime was discovered, you told the police you had gone home the evening before, leaving the prisoner to lock up after you. But this morning you have told the court that the prisoner left the shop before you did, and that you locked the shop up. Which of these two versions is the true one? "

" What I said this morning," came the grudging reply.

Newman paused. The first story is obviously the true one, he told himself ; but why the change? He followed her gaze, and saw the prisoner still scowling at her. Somehow, he mused, the prisoner must have had the chance of a word with her after the police had finished with her and before they'd caught up with him. He must have come round to the shop, heard from her what she'd said, and told her to change the story, and put in that bit about the window, to make it seem as if some unknown person had got in. Fair enough, he thought. You can ask a hostile witness leading questions, he told himself, so here goes.

" Tell me, Miss Feather," he began, " did the prisoner see you after the police had gone, and tell you to change your story for one you know to be untrue? "

But his assurance was short lived. The solicitor was on his feet, but before he could speak the Clerk held up his hand.

" Aren't you going a little fast, Inspector? " he asked. " So far, all you have done is to put to the witness a contradictory statement made by her. You're not entitled, you know, just because of that, to treat her as a hostile witness. She may have some explanation, you know."

" Exactly," breathed the solicitor, as he sat down.

Hostile witness

Newman thought rapidly. What's the difference, he asked himself. Then he remembered. He must get leave of the court. And before he could do that he must show that the witness was actually hostile, not merely contrary.

" Very well, Miss Feather," he said. " If what you have told the court this morning is true, then what you told the detective was a lie? "

" I was muddled," replied the witness.

" Muddled? " repeated Newman. " But why should that make you tell an untruth? "

The witness looked up angrily. " Because he wouldn't leave me alone. You could see he was trying to make me say it was Charlie. They're all alike, coppers. Once they get a down on a feller, he doesn't stand a chance. It was the only way I could stop him going on at me."

Well, thought Newman, that's hostile enough for anyone, I should say. " Your worships," he began, " the witness has not only contradicted herself, but seems to display positive hostility to the police. I do not see how I can get the truth from her unless I am allowed to treat her as a hostile witness."

The Clerk held a hurried consultation with the Chairman, who nodded at the Inspector. " Carry on, Mr. Newman," he said.

Leading questions

" Now, Miss Feather," said Newman. " I am going to try to find out why you have now changed your story. The manager was with you in that little office place when the detective wrote down your story wasn't he? "

" Yes," came the reluctant reply.

" Why did you not protest to him about your treatment by the detective? Was it because it never happened at all? "

The witness was silent.

" Come, Miss Feather," pursued Newman. " He never badgered you at all, did he? You were telling him the truth, weren't you? "

The witness gazed steadily at her hands, and remained silent.

" Well, we shall be able to ask the manager all about that, when he gives evidence in a few minutes," went on Newman. "Let's move on to something else. Did the prisoner eventually come to the shop after the police had gone?"

"No."

"But you spoke to him, didn't you?" asked Newman.

"He 'phoned."

"And you told him what had happened, and what you'd told the police?" asked Newman.

The witness remained silent.

"And he told you to tell a different story if you were asked again?" asked Newman.

No reply.

"Did he, Miss Feather?" persisted Newman. "A story which you have now told the court, and which you know perfectly well is untrue?"

Still no reply. Newman sat down. Better leave it at that, he thought. I suppose I could have given her the statement, and got her to prove it, though; still, I can get the officer back for that, he mused, after the defence has finished with her. But the solicitor looked far from happy, and did not even go through the motions of asking the witness if her story to the court was true. Instead, he shook his head, and walked over to the prisoner.

As Miss Feather left the box, Newman addressed the court.

"I should like to recall the first witness, your worships," he said.

Detective Constable Perks took the oath again.

Proving the statement

"You have told the court," said Newman, "how you came to visit this shop, and how you took a statement from Miss Feather. Is this the statement you took from her, and did she read it over and sign it?" And he handed the original statement to the witness, who nodded and said, "Yes, your worships."

"What was Miss Feather's manner when you were taking the statement down?" asked Newman.

"Very helpful and co-operative," replied Perks.

. . . . .

Half an hour later, the prisoner was being led down the stairs to await the probation officer, and his solicitor was bowing his way out of court. Newman turned to the next file—John Alfred Bunn, causing unnecessary obstruction in the High Street, Smallport.

The passages outside the courtroom echoed to the name of Bunn, and soon a small untidy man in a leather jacket came into view from behind the dock. The Clerk went through his formula, ending by asking Bunn if he admitted the offence.

"I'm admitting nothing," burst out the defendant. "I want to know why I've been treated like this. Why have the police picked on me, making me come here with a proper summons and all, instead of sending me those forms to fill in, without losing a day's work? Just because . . ."

The Clerk held up a hand, and he stopped, champing his jaws as though preparing his next onslaught. The Inspector glanced at the Clerk, and, with a slight movement of his head, indicated Probationary Constable Tate nervously standing near the witness box. The Clerk nodded briefly.

"Mr. Bunn," he said. "The magistrates issued your summons, not the police. You could have written a letter if you had been unable to attend conveniently, but you have chosen to appear. So the case must now go on. Do you plead guilty to the charge?"

"Not guilty," came the reply.

Inspector Newman raised his eyebrows; there was really nothing in the case at all to fight over. However, he nodded to Tate, who was looking anything but happy. This was very different from the Training School, his expression said. Manfully he clambered up the steps, took the oath and told the court who and what he was.

"Officer," said Newman, "were you on duty in the High Street, Smallport, on the afternoon of Monday, the fourth of April this year?"

And so it went on, question and answer. He'll do all right, thought Newman, he's getting more confident every minute, and finding the right pitch to his voice. In ten minutes it was all over, and Bunn was the poorer by forty shillings.

General principles of evidence

Two hours later, Newman found himself facing Superintendent Portly across the familiar desk. Portly dumped some papers in an overflowing tray, got out his pipe and leaned back in his chair, while he fumbled for matches.

"Right, Newman," he began. "How did it go? Let's see, young Tate was having a run this morning wasn't he? How did he shape, eh?"

"All right, sir," replied Newman. "Did quite well. Started off by whispering, then nearly took the roof of. But he soon settled down. Quite a good delivery, really. In fact, I don't think we need bother about him any more, now he's broken the ice. All the same, you know, Bunn took a bit of umbrage at being dragged to court—wanted to know why we hadn't served Magistrates' Courts Act forms on him, so he could do it all by post. Seems to have forgotten all about those little letters he used to write. Anyway, the Clerk soon told him to pipe down."

"Yes, I had a word with the Clerk soon after the new procedure came in, you know," replied Portly. "I explained to him about how we've got to get these probationers used to standing up in the witness box and hearing their own voice. He quite understood. As he said, it's no good waiting till they're at Assizes, at the mercy of any barrister who wants to make their nervousness look like idiocy or dishonesty. It's all right as long as we keep it for cases where there's little or no room for argument, and where previous convictions don't matter much. After all, the defendant can still write a letter if he doesn't want to dispute the charge. And, of course, so long as we don't lumber some unfortunate motorist with half a dozen witnesses' rail fares from Newcastle," he added.

"Yes, sir," agreed Newman. "The other case was a bit odd, though—the larceny servant, I mean, sir."

"Odd?" echoed the Superintendent. "What d'you mean? Didn't get away with it, did he?"

"Oh, no, sir," replied Newman. "Nothing like that. No, what happened was that the girl Feather completely went back on her statement when she got in the box. Tried to say that the prisoner had left the shop before she did, and that she'd locked up."

"What an idiot she must be," said Portly. "How could she hope to get away with it? I suppose he'd got at her somehow. Anyway, what did you do?"

Hostile witnesses

"Oh, I just put her previous statement to her, sir," replied Newman airily. "Nothing to it, really." He could see Portly watching him intently through a cloud of smoke, so he went on rather hurriedly: "That is, I gave the Chairman a copy of her statement to look at, and asked leave to question her about it. But she still claimed that her court story was true, and that her previous statement wasn't."

"So?" murmured the Superintendent.

"Well, sir," replied Newman, deciding not to beat about the bush, "I did start to lead her a bit, because I reckoned she was a hostile witness. But the Clerk chipped in, and said I was going too fast—she hadn't shown herself actually hostile, merely contradictory."

"I don't know about that, you know, Newman," broke in the Superintendent. "Of course, the business about contradictory statements is covered by section 3 of the Criminal Procedure Act of 1865. That says that when your own witness proves 'adverse,' or hostile as it is usually called, and makes a contradictory statement, you can, by leave of the court, prove the previous statement, but only after you have put the statement to the witness. And that doesn't mean handing him a copy of it, but reminding him of the circumstances in which it was made, and asking him whether he made it. On the surface, that gives no right to cross-examine, or ask leading questions of, your own witness, but the next section, section 4, goes on to say that any witness can be cross-examined on a previous contradictory statement. In other words, it seems that, if your own witness proves adverse, you can cross-examine him, *i.e.*, ask leading questions, once you have put the circumstances of the previous statement to him, and got the leave of the court to cross-examine. Indeed, a fairly recent case, *R.* v. *Fraser*,[1] says that if your own witness proves adverse, you should at once hand a copy of the previous statement to the judge, and ask leave to cross-examine. So I would say the Clerk was a bit niggling—I mean, once you'd done what *R.* v. *Fraser* told you to do, and handed the court the previous statement, and asked leave to question the witness on it, and got leave, then I should have thought you could have gone straight ahead and led her."

"Yes, sir," replied Newman, "but the Clerk's point was that I'd put the statement up to the court before she'd proved herself actually adverse—he said that all she'd done was to contradict herself, maybe by being in a muddle, but that I'd not shown she was adverse. Of course, as soon as I asked her why she'd made the original statement, and she said it was because all coppers are so-and-sos, then she was obviously adverse, and I got the green light."

"Well, then, your mistake was to try and lead her before you'd got her to show herself to be adverse; you should have ploughed straight on, without leading questions, and got her to bring her hostility out . . . or got her to show it before putting the previous statement to her, then you'd have been able to kill both birds with one stone, like in *Fraser*. Still, it was all the same in the end, wasn't it?"

"Yes, sir," replied Newman.

"There you are, then, Newman," said Portly. "Every day brings forth something new, eh? And so long as you profit by these little bothers, that's the main point. Come to think of it, you have had one or two little moments, haven't you? Let's see, you've been at it for nearly eighteen months, haven't you?"

"Very nearly, sir," replied Newman.

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[1] (1956) 40 Cr.App.R.

" And do you reckon you've learnt it all yet? "

" Good Lord, no, sir," replied Newman with a short laugh. " Far from it. But I will say it's a good deal clearer to me than it was at first. In fact, in some ways there's a good deal less to it than I'd thought, though in others there's a lot more."

The rules of evidence

" What on earth do you mean, Newman?" asked Portly.

" Well, sir," replied Newman. " It's not such a disconnected jumble of do's and don'ts, all to be learnt separately, as I thought it was going to be. I mean, there is far more of a sensible pattern to it all. It all seems to follow a logical course, though there's plenty of dim bits here and there. As I see it, the job of the prosecuting officer is just to place certain things before the court—really just a sort of well-arranged ' In ' tray. The rest is up to the court."

" Quite right, Newman," said Portly. " But that begs the question, surely. What else is there? "

" Well, the job seems to fall into two distinct parts. One, *what* to put before the court. Two, *how* to put it there."

" But this is just what I was trying to tell you right at the beginning, Newman," said the Superintendent.

" In know, sir," replied Newman. " But it's one thing to be told it, and quite another to experience it. Well, then, as to *what* you put before the court, it can be quite simply summed up as ' evidence.' But when you try to break it down a bit, you get three main headings. First, the nature and function of evidence—by which I mean such things as the burden of proof, presumptions, judicial notice, relevancy, admissibility, and so on."

" Most of those have cropped up in your cases, one way or another, haven't they?" asked Portly encouragingly.

" I haven't had judicial notice yet, sir," replied Newman with a grin.

" You never know," replied Portly.

" No, sir," went on Newman. " Well, second there is who can give evidence—and here I would put such things as competence, privilege, husband and wife, children, lunatics, the accused, compellability, deceased persons and things of that kind."

" Very much doubt if you'll ever get that last one, you know," said Portly.

" I don't know so much about that, sir," replied Newman eagerly. " The C.I.D. have just got a job where part of the case is that chap buying petrol on the night he did the Co-op, and the garage attendant who sold the petrol died about a week after from a coronary, but he'd made a record of the sale, car number, and so on. If they catch up on him, that entry'd be good evidence."

"They'll have to catch him first, though," said Portly. "Anyway, go on."

"Well, third, you get what evidence they can give—and here I would put hearsay and its exceptions, opinion, previous convictions, character, similar acts, privilege again, especially the public safety aspect, police pocket books, dying declarations again, documents, and so on."

"There again, Newman," said Portly, as Newman paused for breath, "you've had most of those already, haven't you?"

"Yes, up to a point, sir," replied Newman. "I haven't had public safety yet, but I think it'll come up in that club case next week; I think they're going to dispute what the observation officer outside saw, and try and find out where he was, so they can prove he couldn't have seen what he said he did."

"Are you well up in all that, Newman? asked Portly, "Because you'd better be, it's a bit tricky."

"Yes, thank you, sir," replied Newman. "I've got the cases and so on. Anyway, sir," he went on, "there's the pattern, as it seems to me; and everything new, whether it's something I run up against, or whether it's a new decision I read about, fits into its place in the pattern. I don't have to learn a lot of unconnected new things, if you see what I mean. Of course, the longer I spend at it the more I realise the whole thing depends on knowing the law of evidence thoroughly. That's what I meant when I said in some ways there's more to it than I'd thought. I never realised that I'd have to know so much of the theory. I mean, in the end it's all practical stuff, but it all stems from the theoretical background. In fact, I feel I've got to get down to that a bit more."

"And so you want me to recommend the best and thickest textbook on evidence I can, eh?" queried Portly, frowning ominously. "Well, I won't. Great thick textbooks are like drugs—they get a hold of you. You start off by taking to them as a means to an end, and before you realise it you're taking them as an end in themselves. Of course, you want to know your way around books like Phipson,[2] Cockle,[3] Russell,[4] Kenny,[5] and so on. But the best textbook of all is the one you build up for yourself, by having a clear pattern in your head, reading the reports, and keeping your Archbold up to date. Oh, I know your academic lawyers think little of Archbold, and your learned reviewers can always find little mistakes and omissions here and there. But when all's said and done it's a practical book, and you're supposed to be a practical chap. Never forget that. Anyway, what else d'you reckon you've learnt? "

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[2] Phipson on *Evidence*, 9th ed.

[3] Cockle, *Cases and Statutes on Evidence*, 9th ed.

[4] Russell, *Crime*, 11th ed.

[5] Kenny, *Outlines of Criminal Law*, 17th ed.

How to put evidence before the court

" Well, sir," replied Newman, " that seems to me to be the best way of looking at *what* you put before the court. The other part of it, the *way* you put it before the court, seems also to be divided into three parts. One, the preparation. Two, the delivery. Three, the procedure.

" Now, by *preparation*, I mean the mechanical things, reading the papers thoroughly beforehand, especially the statements, marking the important parts of them, making notes about them, looking up the law of the offence, including case law, arranging the papers in a handy order in the file, drafting the opening address—or addresses, really, one for a guilty plea and the other for a not guilty plea—making notes for use in examination or cross-examination, bearing in mind previous convictions, both prisoner's and witnesses', checking plans, photographs, and so on."

" Then, by delivery," he went on, " I mean the whole attitude of mind towards the job, like remembering you're not a lawyer, or even an advocate, and that you're not there simply to try and get a conviction come what may, avoiding mannerisms or histrionics, never getting on the defensive, not being aggressive or argumentative, and if there's anything awkward likely to come to light, bringing it out yourself rather than leaving it to be dragged out by the defence. All that sort of thing.

" And finally," Newman continued, " by *procedure*, I mean the technicalities, such as deciding when to accept a plea to the lesser offence, the intricacies of going for trial and not going for trial in indictable offences triable summarily and all that, opening the case when necessary, the order of speeches, examination, cross-examination and re-examination, making objections, dealing with objections made by the defence, coping with hostile witnesses and contradictory statements, supplying details of previous convictions and all that sort of thing. That seems to be about it, sir," he concluded.

" Well, that's fair enough, Newman," said Portly. " You seem to be coming along all right. After all, you've had most of those things already, so now it's just a matter of going ahead and filling in the details by experience. And don't worry overmuch about the mistakes; you're bound to make them. After all, even the judges make them, or there wouldn't be any need for courts of appeal.

The point is, not to make the same mistake twice. No mistake really matters, so long as you learn from it. And you'll always go on learning, because you'll always be getting something new. Before you've finished you'll find yourself proving a by-law or regulation, calling evidence of a dead police officer's pocket book, claiming privilege for the source of a police witness's information, providing secondary evidence of some document you've summoned the defence to produce, explaining the significance of some disputed piece of corroboration, or even having to step in when some defence solicitor inspects an inadmissible part of some document and so makes it admissible." The Superintendent paused, and chuckled. "Y'know, Newman," he went on, "I remember that happening once. It was an indecency case, rather like the one you had the other week from the park here, only with boys. The prisoner had a barrister, not one of the brighter specimens, and of course, having nothing else to work on, he made a bee-line for the officer's pocket book. He could see some scratchings-out showing through a page the officer had pinned down, so he whipped out the pin so as to see what had been scratched out. I suppose he was going to run true to form by trying to show that the officer had something guilty to hide, and so couldn't be trusted. Anyway, this crafty old officer calmly asked for his book back, and read out what was on the covered page. It turned out to be the prisoner's description and a list of his previous convictions, all for similar offences. All good evidence, of course, thanks to the barrister. I don't think he's looked at a policeman's pocket book since—they hurt his eyes!" And the Superintendent shook gently in silent laughter. Then he straightened in his chair.

"Mind you, Newman," he said, his voice heavy with warning. "It wouldn't do these days, that sort of thing, you know. You'd very soon have the Society for the Protection of Fairies, or what have you, raising it in Parliament if you stood by and let counsel prove his own client made a habit of violating little boys. Never do at all. All against the liberty of the subject, you know." He shook his head portentously, as he puffed away at his pipe.

"But that's beside the point, Newman," he went on, reaching across the desk for a thin file bearing a red "Confidential" stamp on its front cover. "The point is, can you speak Tamil? Or Swahili?"

Newman's jaw dropped, as he stared at the Superintendent. "I beg your pardon, I don't quite follow, sir."

"If you can't, now's your chance," announced Portly. "It seems that this colony," and he tapped the file as though he were prodding the very equator itself, "this colony, which, to quote from the covering letter, 'will soon be moving steadily towards self-determination,' is in a temporary difficulty. It appears that it will shortly be needing—and here I quote again—'an officer of experience and background to supervise the setting-up of training facilities for native and European officers, and to advise the Commissioner on the training of senior officers engaged on court work.' Now you take this home with you, and you'll find all about the rank, pay, and conditions of service and so on, as well as a good deal about the country itself. Pretty rum sort of place, if you ask me. Still, bring it back tomorrow morning, and let me know if you want me to recommend you to the Chief for an interview at the Colonial Office—along with a score or so of other young asses with a fancy to see the world at the government's expense. Can't settle down, that's the trouble with a lot of people these days." And the Superintendent's voice trailed off into a mutter, as he crammed his hat on his head, and made for the door. And if you were fifteen years younger, mused Newman, we shouldn't see you for dust.

As Portly passed the window, he glanced out and shivered. Outside, a biting wind was methodically stripping the blossom from the jerking branches of a great chestnut tree. In the street below, people scurried along, collars up, water dripping from their hat brims. At a bus stop, thirty bedraggled people rushed to get on the platform of a bus; twenty-nine of them stepped back to the pavement, to wait for the next one. He turned back, and reached for his overcoat and umbrella.

The Superintendent paused at the door. "And if you think, young Newman," he said, "if you think you'd have nothing to do but lounge around in the sun swigging gin all day and every day, you'd better think again." And off he stumped—probably to a blazing fire, thought Newman, and small blame either. No doubt the old man was right, he mused; there'd be work—hard work, and plenty of it. But there *would* be the sun as well, and a bit of that wouldn't come amiss. At any rate, he told himself, I might just as well see what it was all about. And off he went, the file firmly clutched under his arm.

Laboratory Investigation in Firearms Cases

(I)

CLASSIFICATION AND IDENTIFICATION OF FIREARMS AND AMMUNITION

By Detective Chief Inspector George Price, B.E.M., *Ballistics Section, Home Office Forensic Science Laboratory, Nottingham.*

The laboratory investigation of crimes of violence involving the use of firearms can be divided conveniently into two stages.

The first call upon the laboratory in such cases may well be to carry out an examination of crime bullets and cartridge cases, where the police want information indicating the possible make and type of firearm used in the commission of a crime. This early stage of the investigation may necessitate also the examination of lead pellets, cartridge wads, clothing or articles showing gunshot damage, photographs of damage or injuries and sometimes even parts of a body revealing gunshot traces and injuries.

The second stage of the laboratory investigation may include, among other things, the examination of a suspect firearm and a microscopical comparison of test bullets and cartridge cases with possible crime bullets and cartridge cases.

It is with the examination of a crime bullet and cartridge cases which may be necessary in the very early stages of an inquiry with which we shall concern ourselves in this article.

Crime bullets

Any information which can be supplied in the initial stages of an investigation as a result of the examination of a crime bullet will depend largely on the condition of the bullet. If the bullet is not badly deformed or distorted much information of value to the investigating officer may be obtained. Even when a bullet is badly damaged it may still be possible to supply useful information concerning the weapon from which it was fired.

Calibre

The determination of the calibre of the weapon from which the bullet has been fired does not present any real problems providing the bullet is in good condition. The diameter of the bullet automatically places it within a particular calibre group. The following is a list of the more common calibres of firearms together with the diameters of bullets fired in them:

Calibre of firearm	*Diameter of fired bullet*
·22″	·202″ – ·228″
·25″ (6·35 mm.)	·247″ – ·271″
·32″ (7·65 mm.)	·294″ – ·328″
·38″ (9 mm.)	·350″ – ·375″
·44″	·425″ – ·431″
·45″	·440″ – ·465″

When the distorted condition of the bullet does not permit the diameter to be measured, but the bullet is nevertheless complete, its weight can give an indication of the calibre of the cartridge from which it originated.

Standardisation of bullet weights, which is generally adhered to by cartridge manufacturers, is of assistance in this connection. The following is a brief list of weights of bullets of common calibre:

Cartridge	*Bullet weight*
·22″ short	27 – 30 grains
·22″ long rifle	36 – 40 grains
6·35 mm. auto. (·25″)	48 – 51 grains
7·65 mm. auto. (·32″)	70 – 77 grains
·32″ revolver	80 – 90 grains
·32″ revolver long	98 – 100 grains
·38″ revolver	125 – 180 grains
9 mm. parabellum	113 – 130 grains
9 mm. auto. (·38″)	92 – 130 grains
·45″ auto.	185 – 230 grains
·45″ revolver	225 – 265 grains

Type and make of cartridge

The examination of a bullet will sometimes result in the indentification of the type and make of cartridge from which the bullet originated. The weight, shape, structure and composition of the bullet help in arriving at this information. Occasionally a manufacturer's mark is present on the base of a bullet.

Make and model of firearm

The engraving present on the bullet due to its passage down the barrel would next be the subject of examination. At this stage the engraving would be considered only in relation to those characteristics which are peculiar to the make and model of weapon from which the bullet was fired.

These characteristics include (a) the form of the rifling, (b) the direction of twist of the rifling, (c) the number of grooves and lands, (d) the width of the grooves and of the lands, (e) the pitch of the rifling and (f) the bore diameter.

It has been found in practice that the pitch of the rifling reproduced on a bullet cannot be determined with a sufficient degree of accuracy for it to be of any real value except in isolated cases. However, a general comparison of the pitch and form of the rifling on two bullets can be readily compared by holding them base to base. If the two bullets so compared have been fired from the same make and model of firearm, then there will be shown a coincident agreement of the number of grooves and lands, the direction of twist and the pitch of the rifling, and the width of both the grooves and the lands. (Fig. 4.)

Crime cartridge cases

The types of cartridge cases most likely to be encountered at the scene of a crime are those which have been fired in self loading or automatic weapons rather than those originating from revolvers. An early laboratory examination should always be sought of any such cartridge cases since information of value to the investigation may well be forthcoming.

Calibre

The calibre of a cartridge case can be determined usually without any difficulty and it is in fact often denoted on the headstamp of the cartridge case. However where this is not so, the diameter of the head (and the neck where different) of the case will give an indication of the calibre. The following list will show the relationship between these measurements and the actual calibre of some cartridge cases:

Calibre	*Diameter of Head*
·22″ short and long rifle	·224″ – ·226″
6·35 mm. (·25″) auto.	·273″ – ·279″
7·65 mm. (·32″) auto.	·328″ – ·338″
9 mm. (·38″) auto.	·368″ – ·395″
·45″ auto.	·466″ – ·476″
·32″ revolver	·310″ – ·339″
·38″ revolver	·370″ – ·386″
·45″ revolver	·460″ – ·482″

Type and make of cartridge

Whether the cartridge case is rimless or rimmed will indicate the class of weapon in which it was fired, *i.e.*, self loading or automatic weapon as distinct from a revolver or non-automatic rifle. There are of course exceptions to this. Many revolvers will fire rimless ammunition; this particularly applies to certain ·45″ and to most ·32″ revolvers. Further, a piece of string or wire wrapped round the rim of an automatic type cartridge will often enable the cartridge to be fired in a revolver. Many self loading pistols will fire a revolver type cartridge if the rim of an appropriately calibred cartridge is filed or ground off. This treatment of a cartridge would be evident on the cartridge case.

The presence of an ejector mark on a cartridge case is an important feature indicating that the case has been fired in a self loading or automatic weapon.

Frequently the make of the cartridge is indicated on the headstamp of a cartridge case and in this connection many manufacturers use a " trade mark " or " initials." An index of such headstamp markings is maintained at this laboratory.

Make and model of firearm

The most useful markings on a cartridge case to be considered in this connection are the extractor and ejector marks. Their positions relative to each other are constant within certain limits, for a given make and model of firearm. The shape of the ejector mark may be highly characteristic, particularly when considered together with its position on the cartridge case base in relation to the rim of the case.

Firearms collection at the Nottingham Laboratory

It will be appreciated from the foregoing remarks that before any attempt can be considered to link a crime bullet and cartridge case with a particular make and model of firearm, it becomes necessary to have available a vast amount of information relating to very many different makes of firearms together with that relating to bullets and cartridge cases fired therein.

With a view to undertaking this specialised study of firearms together with their " make and model " characteristics, the collecting of firearms by the author was commenced many years ago. In this respect the continued co-operation of Police Forces and the War Office has been readily forthcoming.

The collection, which is being added to continually, now numbers over 3,500 different makes and models of small arms of all classes and nationalities.

Similarly, a collection of all types and makes of ammunition has necessarily been made so that each weapon in the collection could be fired for the purpose of obtaining test bullets and cartridge cases. The laboratory collection of ammunition is now widely representative and much necessary information regarding cartridges has been collated.

The firearms have been classified according to type under the following headings:—Automatic Pistols. Self Loading Pistols.

Revolving Pistols. Single Shot Pistols. Military Rifles, Sporting Rifles. Sub-Machine Guns. Smooth Bore Guns. Air Guns. Humane Killers. Gas Guns. Signalling Guns. Miscellaneous and Antique Arms.

The firearms in each of the above groups have been further subdivided according to their calibre.

A laboratory reference number and index card is alloted to each firearm. Information relating to the firearm is entered on the card, including the manufacturer's name, the model, calibre, type of cartridge for which the firearm was designed, information of any other cartridge which it is found the firearm will chamber and fire, magazine capacity, direction of ejection of cartridge cases, and any other general information which is considered of value.

Test cartridges are fired in each weapon. The resultant bullets and cartridge cases are recovered and are filed under the reference number of the firearm from which they were fired.

A detailed examination and study of these bullets and cartridge cases is made and characteristics which are revealed as being peculiar to the make and model of firearm from which they were fired are recorded on the firearms index card. Such characteristics include the following:

(a) Type of rifling	Enfield rifling with square cornered grooves and lands is the most common form of rifling in use today.
(b) Direction of twist of rifling	*i.e.*, right or left hand.
(c) Number of grooves	the number of grooves generally varies from three to eight, but sometimes there may be only two or as many as sixteen (micro-groove rifling).
(d) Width of grooves and width of lands	the width of the grooves and that of the lands is measured by means of a dial gauge micrometer specially adapted for the purpose. The groove or land to be measured is projected on to one side of a comparison microscope screen and the tip of the micrometer is projected on to the other side. The micrometer tip is then traversed across the groove or land and the amount of travel, *i.e.*, the width is read off on the dial of the gauge.

(e) Bore diameter	providing a bullet displays some rifling impressions, indicating that it formed a fit in the barrel, its diameter will indicate the calibre of the barrel from which it was fired.
(f) Angle between extractor and ejector marks	this measurement is obtained with the aid of a 360° transparent protractor which is held concentric to the head of a cartridge case which has been projected on to a screen.
(g) Ejector mark position	the position of the ejector mark relative to the edge of the cartridge case is not always consistent, but when considered in conjunction with the shape of the mark, it has been found to be characteristic in a large number of cases.
(h) Shape of ejector mark	the shape of the ejector mark has been found to be highly characteristic. A sketch of this mark is made direct on to the firearm index card. It should be noted here that in some pistols, *e.g.*, Browning, the ejection is caused by the cartridge case striking the firing pin during the recoil movement of the slide.

In the course of collecting the above standard characteristics, a vast amount of other useful information and facts have been revealed.

It has been noted that many makes of firearm leave their own peculiar " trade mark," particularly on cartridge cases. Confirmation that such markings are, in fact, individual and repeatable is only obtained after studying several test bullets and cartridge cases fired in each of a number of firearms of the particular make and model in question. When such marks are produced they form a ready means of identification of the make of firearm in which the bullet or cartridge case was fired.

Because the width of the grooves and lands on a bullet bears a direct relationship to its diameter, not only is it possible from these measurements to arrive at the approximate diameter and calibre of the bullet but it has been observed, in addition, that the total of the width of the groove and that of the land will give an indication of the number of groove and land impressions contained on the bullet.

This may be of value when dealing with a badly distorted crime bullet where, although it is not possible to measure its diameter or arrive at the number of grooves and lands, sufficient of the groove and land impressions are present to enable their widths to be measured.

Examples of bullet calibre related to groove and land width

Calibre	*Number of grooves*	*Total of groove and land width*
·22″	7	2·40 mm. – 2·60 mm.
	6	2·75 – 3·00
	5	3·30 – 3·60
	4	4·15 – 4·50
6·35 mm.	6	3·20 – 3·35
	5	3·85 – 4·05
	4	4·80 – 5·00
7·65 mm. ·32″	7	3·40 – 3·60
	6	4·00 – 4·20
	5	4·75 – 5·05
	4	5·95 – 6·30
9 mm. ·38″	7	3·90 – 4·15
	6	4·50 – 4·85
	5	5·50 – 5·80
	4	6·80 – 7·25
·45″	7	5·00 – 5·25
	6	5·85 – 6·15
	5	7·00 – 7·40
	4	8·75 – 9·25

It has been found convenient to employ a punched card system for the purpose of filing the foregoing information. An illustration of a specimen card is shown (fig. 1) together with a card for a 9 mm. Beretta pistol (fig. 2).

The success of any such system of identification obviously depends on the condition of the crime bullet and cartridge case in question, on the extent of the collection of firearms and available information, and on the experience of the laboratory investigator.

In the author's experience, although there are many instances where the make of firearm used in the commission of crime cannot be established with certainty, there are others where a positive identification can be made. Sometimes it is of assistance to the investigation to be able to eliminate certain makes of firearm and on other occcasions it may help to be able to say that a certain make of firearm could have been used.

Fig. 1. **Index card showing information relating to firearm.**

Name of firearm.
Manufacturer.
Country of origin.

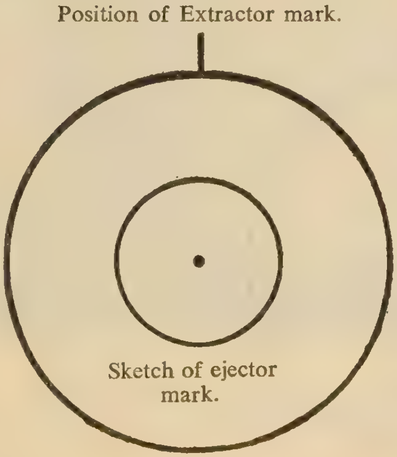
Model.
Serial No.
Lab. Index No.

Calibre.
No. of grooves.
Direction of twist.

Width of grooves.
Width of lands.
Diameter of fired bullet.

Miscellaneous information.

Front of card.



Cartridge information.

Magazine type and capacity.

Ejection direction.

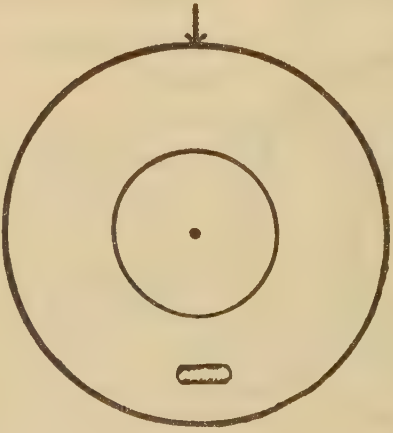
Angle between extractor and ejector marks.

Reverse of card.

Fig. 2. **Specimen card for Beretta 9 mm. Self Loading Pistol.**

Beretta Self Loading Pistol.	Pietro Beretta.	Italy.
Mod. 1934	680824	34
9 mm.	6	Right
1·23 mm.	3·31 mm.	·358″

Front of card.



9 mm. Browning Short
(·380″ Auto.)

Removable box.—
7 round.

Backward ejection.

180°

Reverse of card.

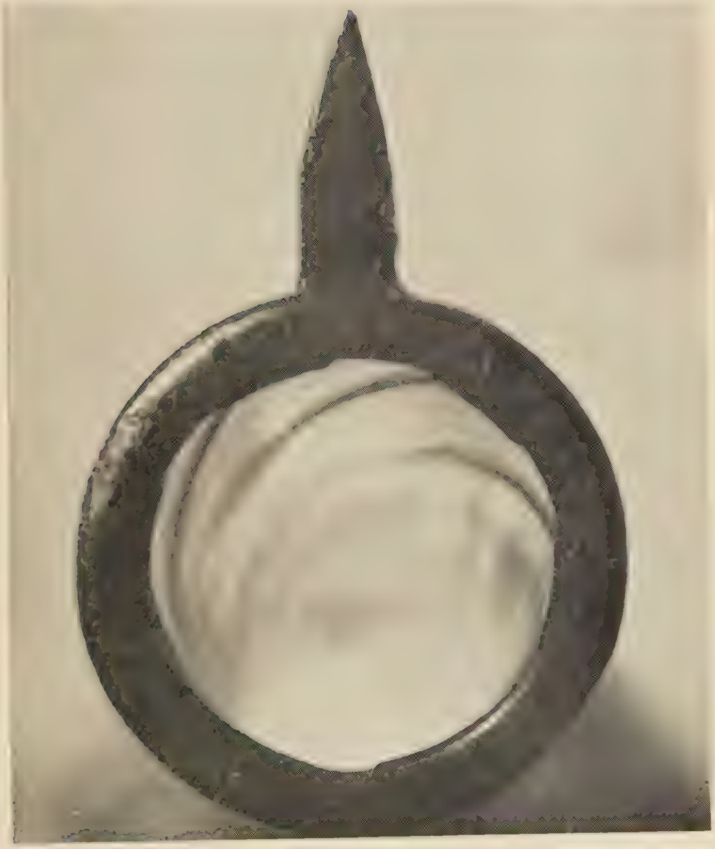


Fig. 3. Revolver barrel viewed from muzzle end showing rifling with left hand twist.

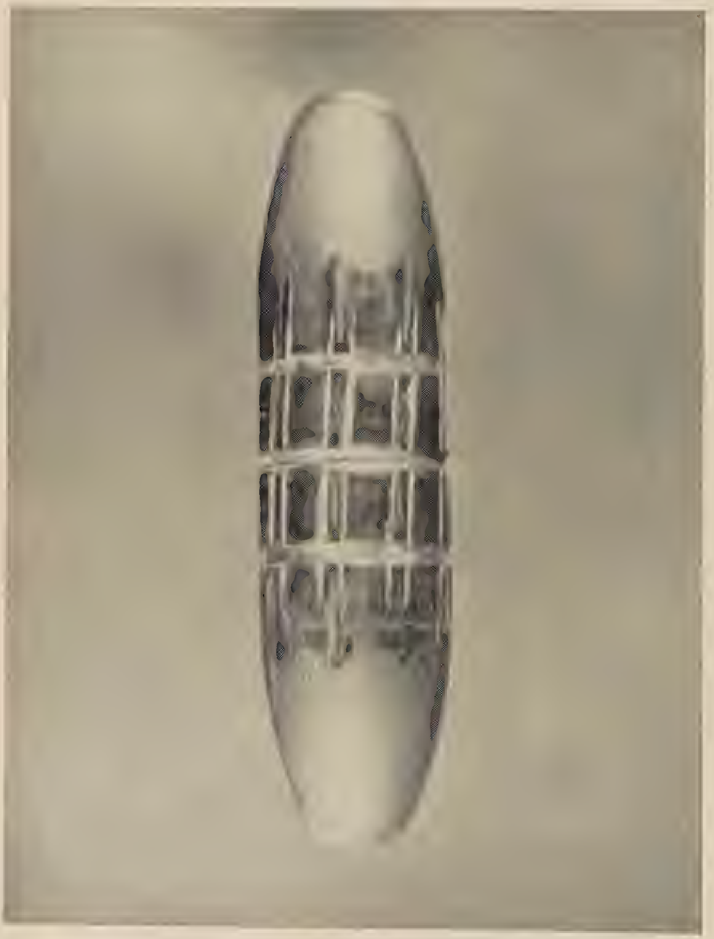
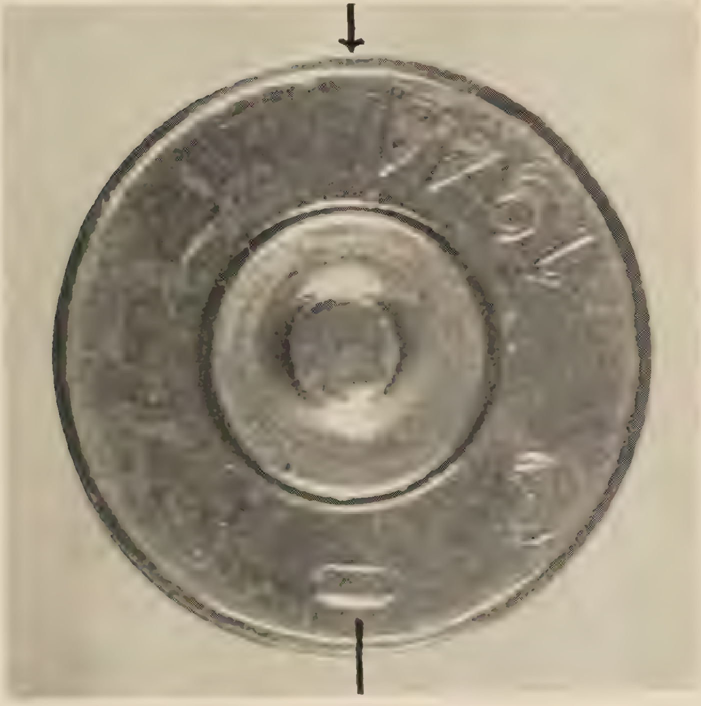


Fig. 4. Two bullets placed base to base showing agreement of rifling.



Position of extractor mark.

Ejector mark.

Fig. 5. A crime cartridge case identified as having been fired in a Beretta 9 m.m. self loading pistol.

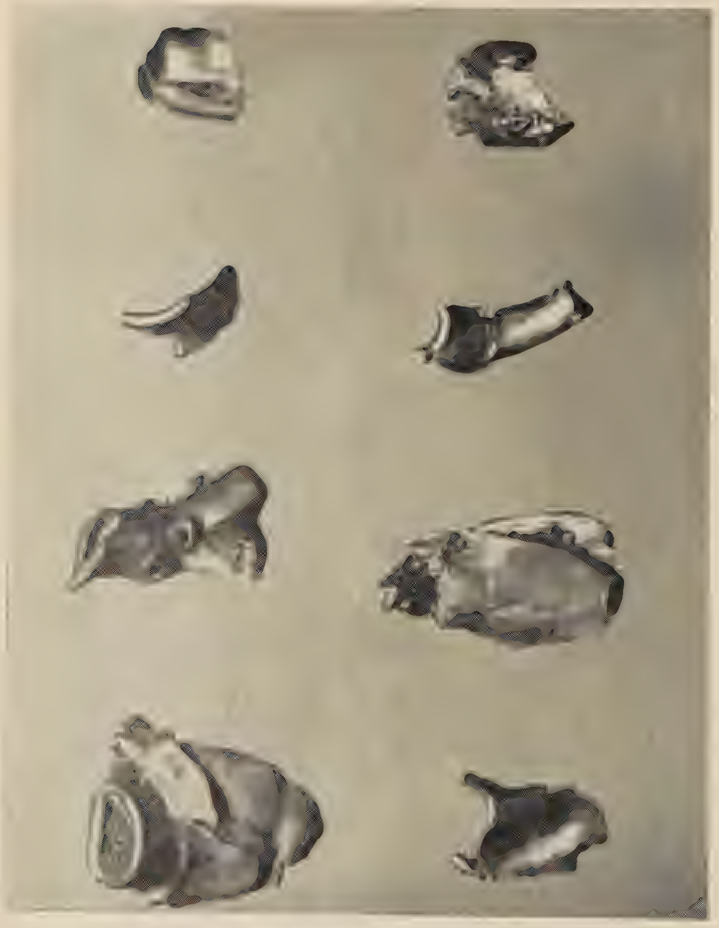


Fig. 6. Fragments of crime bullets identified as having been fired in a Colt ·455″ revolver.

Practice and Procedure

Parking meters

Prosecutions for failing to name an offending driver

The Road Traffic Act, 1956, which permits certain local authorities to introduce parking meter schemes in specified streets, provided by section 32 that any such local authority should have the same powers as the police to obtain information as to the identity of the driver of a vehicle alleged to have committed an offence in relation to a meter parking place. The powers in question, set out in section 113 (3) of the Road Traffic Act, 1930, are (1) to require this information from the owner of the vehicle, and (2) to require it from any other person who has it in his power to give it. There is no statutory provision with regard to the manner in which the police may make these requirements, but section 32 of the 1956 Act obliges a local authority to make them in writing.

It was clearly necessary to give local authorities these powers. Economic considerations prevent the appointment of a sufficient number of parking meter attendants to ensure that they see the driver of an offending vehicle either when he leaves it or when he returns to it; all these attendants can do, in most cases, is to make a record of the vehicle's registration number and attach to it a ticket giving particulars of the alleged offence. The local authority has then to ascertain who is the owner or other person who can identify the driver; and the next step is to require that person in writing to supply the necessary information.

Local authorities are not likely to be staffed on a scale which will make a personal interview with the individual concerned practicable. The alternative is to send the requirement by post to him. Sometimes he will reply admitting that he, himself, was the driver on the occasion in question. By section 2 of the Magistrates' Courts Act, 1957, such a statement, signed by him, may be accepted as evidence on that point if he is subsequently accused of the offence in question. Should the person required to give information name some other person as the driver a requirement to give information will be sent to that other person as one who has it in his power to give information; and, once again, by virtue of section 2 of the 1957 Act, a signed admission by that person that he was the driver can be used as evidence of the fact in proceedings against him.

If, however, the local authority does not get a signed admission in reply to a request for information made in this way, serious practical difficulties arise when it comes to bringing a prosecution. In a case where some individual has been named as the driver by the person required to give information, it might turn out, when he was called as a prosecution witness, that his allegation was based on hearsay, and so could not be admitted in evidence. To guard against such a possibility it would be necessary, before bringing a prosecution on information of this kind, to have interviews with potential witnesses and those interviews might have to be conducted by officers of the local authority hundreds of miles outside its area. Few councils have suitable manpower to spare for work of this nature.

In the more frequently encountered case, where there is an absence of any reply at all from the person required to give information, additional difficulties are encountered. The only prosecution possible to begin with is for the failure to give information; obviously no proceedings can be taken in respect of the original offence until someone has identified the driver. The person who has failed to give the necessary information will usually be the alleged owner of the vehicle in question. How are the local authority to prove that fact in a prosecution, if he has made no admission? The only evidence which can be relied on to be available in every case is the registration of the vehicle for taxation purposes; the records of the council concerned will show who was deemed to be the owner for those purposes at the relevant time. But to prove this fact it may be necessary to bring local taxation officials long distances from their place of work in order to give the requisite formal evidence; even then, if the defendant has changed his address since the last licensing of the vehicle, proof of identity may not be satisfactory.

Assuming that ownership is established, the local authority has to get over a still more awkward hurdle in order to prove the failure to comply with the requirement to give information. No provision of any statute or regulation lays down, in terms, that such a requirement may be served by post. The law has made receivable in evidence an admission written in response to a demand for information sent by post (section 2 of the Magistrates' Courts Act, 1957, mentioned above). But that is a long way from establishing the converse proposition of law, namely, that, in the absence of a reply to such a postal demand, the safe receipt of the demand can be assumed. To satisfy the terms of the statute, it must be proved that a requirement to give information has been *made*; the Act says nothing about what has to be proved if the requirement is sent by post. If the court rejects the frequently made assertion by the defendant that he never received any communication from the council, ought it, in fairness, to reject the sometimes made assertion that a reply was sent by post to the council even though its officers say there is no record of its receipt? In either case the court is faced with statements which cannot, by their nature, be verified or rebutted.

One further problem arises in this kind of case. When should the requirement to give information be deemed to take effect, if it is in the form of a letter sent by post? The local authority may specify a time limit in its demand, but such a time limit will have to be fixed arbitrarily by the authority without any mandate from the statute. On the other hand, unless a time limit is stated or implied, how is it possible to give a date to the offence and show that summary proceedings are being taken within six months of the failure to give information? Unless there was a time limit for giving the information, it would be possible, too, for a defendant to supply it after receiving a summons for the offence and then argue that he could not be convicted. Any time limit must, of course, be a reasonable one; it would not be reasonable, for example, to require information within fourteen days from a person who had gone abroad for three months on legitimate business. But how could the local authority know of the existence of such circumstances, unless it were to make full inquiries in each case? And that would, once more, raise insuperable staff problems.

Clearly, then, sending a request for information of the kind in question by post is an unsatisfactory basis for a prosecution for failing to give the required information. It is the usual police practice, before bringing such a charge, to have the proposed defendant interviewed personally by an officer. This is obviously the best way of dealing with the situation, and the one originally contemplated by section 113 (3) of the Road Traffic Act, 1930. Direct proof can then be given that the requirement was made and any failure to respond to it can be dated to the occasion of the interview with the officer. If local authorities are to be left with the task of enforcing legislation of this kind, they will either have to recruit special staff to deal with it, or else new statutory provisions will be necessary to make proof of offences easier.

[A. E. JONES.]

Case and Comment *

EVIDENCE

Criminal Evidence Act, 1898, s. 1 (f)—cross-examination as to previous charge

R. v. Cokar

Court of Criminal Appeal: Lord Parker C.J., Ashworth and Salmon JJ.: April 11, 1960: *The Times*, April 12, 1960.[1]

C. was convicted at quarter sessions of entering a dwelling-house by night with intent to steal. He had entered the house through a window sometime after midnight and was found by the householder shortly afterwards sitting in a chair in front of the fire. He had apparently made no attempt to steal anything. C. was cross-examined to the effect that he knew it was no offence if he was merely found on the premises sleeping; and leave was sought to cross-examine C. as to a previous occasion on which he had been found on private premises and had been charged and acquitted. The questions were allowed and C. convicted. On appeal to the Court of Criminal Appeal:

Held, allowing the appeal, that the purpose of the cross-examination had been to show that on the occasion of the previous charge C. must have learnt that no offence was committed in law by a person who was on premises for an innocent purpose such as sleeping. Whether or not the questions were allowable depended on the true interpretation of section 1 of the Criminal Evidence Act, 1898, and in particular, of paragraph (*f*), where there was a complete prohibition on suggesting that a man had been previously charged, whatever the result of the charge. There were three exceptions to this prohibition, but the question in this case was whether the cross-examination was admissible under the first exception, namely: " Unless the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he has been charged." The exception only dealt with the commission or conviction of other offences and there was no reference to "charge." Accordingly, it was impossible to question a man in regard to a charge of which he had been acquitted under this exception. Thus the cross-examination had been wrongly allowed and the conviction would be quashed. [H. P.]

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* Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For the appellant: Miss *M. Wigoder* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Michael Corkrey* (instructed by the Solicitor, Metropolitan Police).

Commentary. The Criminal Evidence Act, 1898, s. 1 (*f*) provides that the prisoner who gives evidence may not be asked in cross-examination whether "he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged . . ." unless he comes within the terms of one of three specified exceptions. *Maxwell* v. *D. P. P.* [1935] A.C. 309 decided that it is not sufficient that a particular question relating to one of the matters referred to comes within the terms of an exception unless it is also capable of justification according to the general rules of evidence and, in particular, satisfies the test of relevance. In that case the question came within the terms of exception (ii), for the prisoner had set up his good character, but failed to satisfy the common law test of relevance, since "the mere fact of a charge cannot in general be evidence of bad character or be regarded otherwise than as a misfortune."

The position in the present case is the reverse. The question would appear to satisfy the test of relevance but not to come within the terms of the statutory permission which, in this case, was exception (i). The present case appears to be the first decision on whether cross-examination under exception (i) is confined to the commission or conviction of other offences. The matter is lucidly discussed by Cross, *Evidence*, 315–317 who, however, expresses the opinion that "questions concerning a charge are admissible . . . and they appear to be allowed by the statutory wording." No explanation is given as to how the statutory wording can be interpreted to admit questions relating to a charge, and it is respectfully submitted that the court in the present case adopted the better view of the construction of the statute. The contrast between the prohibiting words, "committed or been convicted of or been charged with any offence," and the permitting words of exception (i), "committed or been convicted of," seems to indicate a clear intention that there should be no cross-examination as to a mere charge under exception (i). On the other hand, the view which would appear to underlie Dr. Cross's argument, that evidence of a charge may be just as relevant to prove guilty knowledge as evidence of commission or conviction of an offence, is persuasive that, in a well-drafted statute, cross-examination as to a charge would be permitted.

The court said, *obiter*, that if exception (i) came into play and it was sought to be proved that the accused had been *convicted* of the previous offence, it would be proper, in leading up to that, to ask him whether he had been charged.

Rape—indecent assault—corroboration—insufficient direction to jury—effect

R. v. Halligan

Court of Criminal Appeal: Lord Parker C.J., Sachs and Ashworth JJ.: April 4, 1960: *The Times*, April 5, 1960.[2]

H. was convicted at assizes of rape and indecent assault on two girls aged ten and nine years. H. had in the first place denied all knowledge of any assault, but on arrest had made certain oral statements, and after caution had signed a written statement amounting to an admission of indecency. H's case at the trial was that the written statement had been made in circumstances in which police officers had read out allegations to him and that H. had merely signified his assent to everything that was put to him under threats of being beaten up. H. appealed to the Court of Criminal Appeal on the main ground that the jury had not been properly directed on the issue of corroboration.

Held, allowing the appeal, that this was a case where a clear direction on corroboration was called for. The trial judge had given a proper direction as to the general requirements of corroboration in cases of sexual assault on children, but had then gone on to say that in the case before them there was corroboration of an abundant nature and that they did not, therefore, need to concern themselves about those requirements. The signed statement would have provided abundant corroboration, but the judge unfortunately omitted to direct the jury as to the other matters (*e.g.*, the oral statements and the evidence of the elder girl in support of the younger girl's story) which they might have taken into consideration if they had decided to reject the signed statement as evidence. This court had decided, with some reluctance, that the conviction would have to be quashed. [H. P.]

Commentary. In *Davies* v. *D. P. P.* [1954] AC 378 the House of Lords laid it down that a conviction will be quashed where an accomplice's evidence has been tendered and no warning has been given as to the danger of convicting on his uncorroborated evidence, even if, in fact, there be ample corroboration. The reason, no doubt, is that a jury may disbelieve the "ample" corroborative evidence and, if they have not been warned, convict upon the accomplice's evidence, without subjecting it to that additional scrutiny which the warning is supposed to induce. It would seem that similar principles ought to govern other cases such as the present, where corroboration is required as a matter of practice.

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[2] For the appellant: *Piers Ashworth* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Brian Bush* (instructed by Mr. D. M. Morgan, Birmingham).

FORGERY

Uttering forged document—intention to deceive not defraud—whether economic loss necessary

Welham v. D. P. P.

House of Lords: Lords Radcliffe, Tucker, Keith of Avonholm, Denning and Morris of Borth-y-Gest: March 24, 1960: [1960] 2 W.L.R. 669.[3]

Welham, as sales manager of a firm of motor dealers, had witnessed forged hire-purchase agreements, on the strength of which finance companies had advanced large sums of money to the firm.

He was charged with uttering forged documents, contrary to section 6 of the Forgery Act, 1913.

Section 4 of the Act provides: "(1) Forgery of any document, which is not made felony under this or any other statute for the time being in force, if committed with intent to defraud, shall be a misdemeanour. . . ." Section 6 of the Act provides " (1) Every person who utters any forged document . . . shall be guilty of an offence of the like degree . . . and on conviction thereof shall be liable to the same punishment as if he himself had forged the document. . . ."

At his trial at the Central Criminal Court, Welham's defence was that he had believed that the agreements were brought into being to enable the finance companies to lend money which they could not ordinarily do because of credit restrictions, and because by their memorandum and articles of association they could not act as moneylenders. He claimed that the purpose of the hire-purchase agreements was to make it appear that the finance companies were advancing money in the way of their business as finance companies. He accordingly contended that he had no intention to defraud the finance companies, but that he was merely uttering the documents to mislead the relevant authority, who might inspect the records to see that the credit restrictions were being observed, and whose duty it was to prevent their contravention.

The Common Serjeant directed the jury that these facts disclosed a sufficient intention to defraud to bring it within the provisions of the Forgery Act, 1913. Welham was convicted.

On appeal it was contended on Welham's behalf that his intention was merely an intention to deceive and not an intention to defraud, which, it was contended, involved some economic loss to the person deceived.

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[3] For Welham: *Gerald Gardiner, Q.C.* and *C. W. G. Ross-Munro* (instructed by Bellamy, Bestford & Co.). For the Crown: *Sir Jocelyn Simon, Q.C., S.-G., J. H. Buzzard* and *M. D. L. Worsley* (instructed by the Director of Public Prosecutions).

Held, dismissing an appeal from the Court of Criminal Appeal [1960] Crim.L.R. 190, (1) that the " intent to defraud " in section 4 (1) of the Act was not to be confined to the deprivation of a person by deceit of some economic advantage or the infliction upon him of some economic loss ; and

(2) That an intent to defraud existed when the false document was brought into existence for no other purpose than of deceiving a person responsible for a public duty into doing something that he would not have done but for the deceit, or not doing something that but for it he would have done ; and

(3) That to put forward documents such as the forged hire-purchase agreements, with knowledge of their falsity, and with a similar intent, was to commit the crime of uttering the false document. [D. C.]

Commentary. The present case affirms the law as laid down in earlier cases. The statements of the law on the meaning of " defraud " in *Russell* and *Kenny* should be regarded with caution. For discussion of the problem in this *Review* see [1960] Crim.L.R. 131 and 367.

HOMICIDE

Murder—diminished responsibility—issue of insanity raised by prosecution

R. v. Grant

Liverpool Assizes: Paull J.: February 12, 1960.[4]

The prisoner was charged with the murder of his son. Counsel for the defence did not challenge that the prisoner killed his son and contended that a proper verdict was one of guilty of manslaughter, because of diminished responsibility.

In cross-examination the doctor called for the prisoner said that at the time of the killing the prisoner did not know the nature and quality of his act.

Counsel for the prosecution contended that a proper verdict was one of guilty but insane.

Paull J. directed the jury that the defence could establish diminished responsibility by showing that that contention was more probable than not ; while the prosecution could establish that the prisoner was insane within the meaning of the M'Naughten Rules, only by proving their contention beyond reasonable doubt, since it was an issue set up by the prosecution.

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[4] For the prosecution: *Brabin, Q.C.* and *Currie* (instructed by the Director of Public Prosecutions). For the prisoner: *Wooll, Q.C.* and *Wright* (instructed by Silverman and Livermore).

Verdict: Guilty but Insane. [PETER SMITH, *Barrister-at-Law*.]

Commentary. Where the prisoner sets up the defence of insanity the standard of proof required is the same as that imposed on the plaintiff in a civil action—*i.e.*, on a balance of probabilities. It is only since the Homicide Act, 1957, introduced the defence of diminished responsibility that the question of the standard required of the prosecution has been raised. In *R.* v. *Bastian* (1958) 42 Cr.App.R. 75; [1958] Crim.C. & C. 67 Donovan J. held that, where the defence puts the state of the accused's mind in issue by pleading diminished responsibility, the prosecution may call evidence to show that the prisoner is insane within the meaning of the M'Naughten Rules. The learned judge is reported to have added that it had occurred to him, after his summing up, that in such a case it would be for the prosecution to satisfy the jury that the state of the accused's mind went beyond what the defence contended and amounted to insanity; but he made no reference to the standard of proof to be required. The present ruling (which, it is believed, is the first to be reported on the point) accords with the view expressed at [1958] Crim.C. & C. 68. It is supported moreover by analogy with the dictum of Edmund Davies J. in *R.* v. *Podola* (1959) 43 Cr.App.R. 220; [1959] Crim.C. & C. 83, 86, that, where the prosecution assert that the prisoner is unfit to plead, the onus of so proving beyond reasonable doubt is on them.

Murder and insanity—" uncontrollable impulse " no defence in law

Attorney-General for the State of South Australia v. Brown

Judicial Committee of the Privy Council: Viscount Simonds, Lords Radcliffe, Tucker, Jenkins and Morris of Borth-y-Gest: March 9, 1960: [1960] 2 W.L.R. 588.[5]

Brown was charged with murder by shooting. At his trial his only defence was insanity. The medical evidence for the defence was that Brown was a schizoid personality, and that at the moment when the shooting took place, he knew the nature and quality of his act, but that he did not know that what he was doing was wrong.

In the course of the summing-up, the trial judge directed the jury that " uncontrollable impulse " was no defence in law. Brown was found guilty, and was sentenced to death.

On appeal to the High Court of Australia, the conviction was quashed, and a new trial ordered. On appeal to the Judicial Committee:

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[5] For the Attorney-General: *T. G. Roche Q.C., D. A. Grant* and *W. A. N. Wells* (instructed by Blythe, Dutton, Wright & Bennett). For Brown: *L. J. Elliott* (Lawrence, Jones & Co.).

Held, allowing the appeal and restoring the verdict of the trial court, (1) that where the defence of insanity was raised, the law did not recognise irresistible impulse as a symptom from which the jury might, without evidence, infer insanity within the M'Naughten Rules; but

(2) that where evidence had been given that irresistible impulse was the symptom of the particular disease of the mind from which a prisoner was said to be suffering, and as to its effect on his ability to know the nature and quality of his act or that his act was wrong, it would be the duty of the trial judge to deal with the matter in the same way as any other relevant evidence given at the trial.

[D. C.]

Commentary. The view of the High Court of Australia was that, while uncontrollable impulse is no defence as such, it may afford strong ground for the inference that a prisoner was labouring under such a defect of reason from disease of the mind as not to know that he was doing what was wrong. The Privy Council held that the law does not know or recognise uncontrollable impulse as a symptom of insanity within the M'Naughten Rules. If medical evidence were tendered in any particular case that the uncontrollable impulse, to which the accused in that case had allegedly been subject, was a symptom that he did not know his act was wrong, it would, apparently, be open to the jury to act on that evidence. It is not, however, permissible for a judge to make use in one case of medical knowledge which he may have acquired in another, in his direction to the jury.

LARCENY

Shopbreaking and larceny—defence that goods were found outside shop—power to convict of larceny outside shop

R. v. Brodrick

Southampton Borough Quarter Sessions: T. R. FitzWalter Butler, Esq., Assistant Recorder: January 28, 1960.[6]

The prisoner was charged with shopbreaking and larceny, contrary to section 26 (1) of the Larceny Act, 1916, the particulars of offence alleging that on a particular day he broke and entered a certain shop and stole therein twenty-four children's dressing-gowns.

Evidence was given by a police officer on behalf of the prosecution that when he visited a house where the prisoner was lodging, a few hours after the shop had been broken into, he found the prisoner in possession of the dressing-gowns and that the prisoner then told him that he had found them in a street. At the trial the prisoner gave evidence to that effect, stating that he had found the dressing-gowns lying in a heap in a street near the shop; that he never intended to appropriate them; that he took them home because he did not see any police officer in the neighbourhood and was feeling the worse for drink; and that his intention was, after he had had a sleep, to take them to the police station next day. The dressing-gowns bore the name of the shop which had been broken into.

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[6] For the prosecution: *John Spokes* (instructed by the Prosecuting Solicitor, Southampton). For the defence: *G. W. Cheyne* (instructed by Woodford & Ackroyd, Southampton).

Before counsel addressed the jury, the Assistant Recorder invited counsel to make submissions to him on what would be the position in law if the jury accepted the view that the prisoner had found the dressing-gowns in the street, but were of opinion that he then decided to appropriate them, although he knew that by taking reasonable steps the owner was likely to be traced, and whether in such circumstances the prisoner could be convicted of simple larceny, *i.e.*, larceny by finding, on this indictment. Counsel for the prosecution submitted that a verdict of guilty of larceny would be open to the jury. Counsel for the defence called attention to the word " therein " in the Particulars of Offence and submitted that on the indictment the prisoner could be convicted only of larceny in the shop and not of larceny by finding outside the shop.

The Assistant Recorder referred to the case of *R.* v. *Andrews* (1841) C. & Mar. 121, as authority for the proposition that the word " therein " could be treated as surplusage. He directed the jury that if they took the view that the prisoner found the dressing-gowns in the street, as he said, and if they believed that his intention then was to return them sooner or later to the police or were left in reasonable doubt whether he did intend to appropriate them, they should acquit; but if they took the view that at the time when he found them he intended to appropriate them, and that the circumstances of the finding were such as to constitute larceny by finding (which he explained to the jury), the jury would be entitled on this indictment to convict of larceny. If, however, the jury rejected the prisoner's story of finding the dressing-gowns in the street and felt sure that he had obtained possession of them by breaking into the shop and stealing them therefrom, they would convict of shopbreaking and larceny.

The jury returned a verdict of Guilty of shopbreaking and larceny.

[T. R. FITZWALTER BUTLER, *Barrister-at-Law.*]

Commentary. Where it is proved that premises have been broken and entered and property stolen therefrom and that, very soon afterwards, the prisoner was found in possession of the stolen property, the jury should be directed that there is evidence upon which they may convict the prisoner of breaking and entering: *R.* v. *Loughlin* (1951) 35 Cr.App.R. 69.

It is difficult to see how it could be said that *R.* v. *Andrews* decided that the word " therein " was surplusage. An indictment for housebreaking, after charging the breaking and entering, alleged that the prisoner " then and there feloniously did steal . . ." It was held that the words " then and there " were sufficient without the words " in the same dwelling-house " being added to them. This seems to indicate that the words " then and there " (which the deputy-chairman presumably considered equivalent to " therein "), far from being surplusage, were sufficient to designate the place of the theft. Yet the whole difficulty about the present case was, apparently, that the prisoner was charged with stealing the goods in a place different from that where, according to his own story, he took them.

Nevertheless, it is respectfully submitted that the ruling was correct. In *R.* v. *Wallwork* (1958) 42 Cr.App.R. 153, [1958] Crim.C. & C. 31, the accused was charged with incest " in the County of Sussex or elsewhere " and the Court of Criminal Appeal held that the indictment was good. Lord Goddard C.J. said: " So far as place is concerned . . . incest is an offence wherever it is committed, and it matters not whether it is committed in one place or another, provided that the prisoner knows the substance of the charge against him." The proposition is as true of simple larceny as it is of incest.

MALICIOUS PROSECUTION

Reasonable and probable belief in guilt—question for judge, not jury

Glinski v. McIver

Court of Appeal: Lord Morris, Sir Charles Romer and Willmer L.J.: *The Times*, February 6, 1960.[7]

G. sued M., a police officer, for wrongful arrest, false imprisonment and malicious prosecution. M. admitted that the arrest had been unlawful. The action for malicious prosecution was in respect of an alleged offence of conspiracy to defraud, for which G. was tried and acquitted.

The jury found that M. had been actuated by malice; that M. did not honestly believe that G. was guilty of the offence of conspiracy to defraud, but that M. had had reason to believe that G. might be identified with the person who was said to have been guilty of the offence of conspiracy to defraud. The trial judge, holding that there was no reasonable and probable cause for the prosecution, gave judgment for G.

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[7] For M.: *F. H. Lawton, Q.C., W. W. Stabb* and *A. D. Walder* (instructed by the Solicitor, Metropolitan Police). For G.: *W. R. Rees-Davies, Paul Sieghart* and *F. Lewis* (instructed by Probyn, Dighton & Parkhouse).

Held, allowing an appeal by M., that it could not be said that there was an absence of reasonable and probable cause. [D. C.]

Commentary. The existence or absence of reasonable and probable cause is a question for the judge; and the onus of proof is on the plaintiff who must prove its absence. The trial judge ruled in favour of the plaintiff because the jury had answered in the negative the question: " Did the defendant honestly believe . . . that the plaintiff was guilty of the offence of conspiring to defraud? " The Court of Appeal held that that was not an appropriate question to leave to the jury and that the question of the absence of reasonable and probable cause should be determined without regard to its answer.

ROAD TRAFFIC

Dangerous driving—notice of intended prosecution—sufficiency

R. v. Rowbotham

Oxfordshire Quarter Sessions: Deputy Chairman, M. A. B. King-Hamilton, Esq., Q.C.: March 31, 1960.[8]

Rowbotham was committed for trial on a charge of driving a motor-vehicle in a manner dangerous to the public, contrary to section 11 of the Road Traffic Act, 1930. The depositions disclosed that the alleged incident took place at about 3 p.m. on December 8, 1959, on the A.40 Oxford to London Road at Adwell Hill in the parish of Adwell in the County of Oxford. There was no accident, and the defendant was not stopped at the time, nor summonsed within 14 days thereafter.

A notice of intended prosecution was served on the defendant on December 20, 1959, specifying the time of the alleged offence as about 3 p.m., and the place as " the A.40 Oxford to London Road at Lobbs Hill in the Parish of Great Haseley in the County of Oxford." No further particulars of the driving were given therein.

It was admitted that there was a distance of 3 miles between Adwell Hill and Lobbs Hill, and that there was an intervening Parish between those of Adwell and Great Haseley.

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[8] For the prosecution: *F. L. Clark* (instructed by Thomas, Mallan, Grimsdale & Co., Oxford).
For the defence: *Basil Wigoder* and *Denis Hart* (instructed by Reginald Johnson & Co., Hayes).

By way of a preliminary point it was contended by the defence that the notice was bad because it had failed to specify the place where the alleged offence had been committed, as was required by section 21 (*c*) of the Road Traffic Act, 1930.

Held (following *Young* v. *Day*, 1959, Crim.L.R. 460), that the notice was bad, and that therefore the defendant could not be convicted. The prosecution thereupon offered no evidence.

[B. WIGODER, *Barrister-at-Law*.]

Commentary. Whether there has been compliance with the requirement that the place of the offence must be specified is a matter of degree and a question of fact, in deciding which it is apparently permissible for the court to take into account its local knowledge of the road in question: *Young* v. *Day* (above).

Dangerous driving—objective and subjective tests

R. v. Johnson

Central Criminal Court: His Honour Judge Maxwell Turner: March 4, 7, 1960.[9]

Johnson was charged with causing death by dangerous driving. The incident occurred on Western Avenue, near the junction with Hangar Lane, where a fly-over is under construction. As one side of the road was closed to traffic, both lines had to use the same half of the road. The defendant was driving his car, from east to west, passing some other cars but at a speed within the 40 m.p.h. limit, when he came into head-on collision with another car, being driven from west to east, the driver of which was killed. The defence was that Johnson was excused by the fact that he reasonably thought that he was driving along a dual carriage-way and that any oncoming traffic would be on the other part of the road. The incident occurred at night. The lighting was good on the side of the road in use.

The defence submitted that the effect of *Hill* v. *Baxter* [1958] 1 Q.B. 277 was that if a man is driving a vehicle and if by purely objective standard, applied purely objectively, that driving is found to be dangerous, then he is guilty of dangerous driving unless for some reason, *e.g.*, an epileptic fit, the apparent driver is not in fact driving the vehicle. Devlin J. at p. 284 said: "I am satisfied that even in a case in which liability depended upon full proof of *mens rea*, it would not be open to the defence to rely upon automatism without providing some evidence of it." That gave a hint of a defence. See also Pearson J. at the bottom of p. 286, where he considers subjectively the responsibility of the driver for keeping awake. If the state of the mind of the driver is irrelevant, then a driver would be guilty of dangerous driving if, misled by traffic signs altered by some practical joker, he did exactly what it appeared he was meant to do by the authorities.

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[9] For the prosecution: *J. Buzzard* (instructed by Metropolitan Police Solicitor). For the defence: *Malcolm Morris, Q.C.*, and *F. E. H. Gibbens* (instructed by Gasquet, Metcalf and Walton, 23 Philpot Lane, E.C.3).

The prosecution in reply said: "It is true that the test of reckless driving is subjective, but that is not relevant to dangerous driving. *Hill* v. *Baxter* has to be considered more closely; the decision is contrary to the submission that the driver must know that what he is doing is dangerous. The judgments were considered judgments and laid down an absolute prohibition. As for the practical joker, had the signs been turned round any reasonable person would have assumed a dual carriageway; the danger would have been caused, but not by dangerous driving.

Held, the intention of the driver as to the way in which he drives is immaterial to this charge. A mistaken belief in a dual carriageway affords an explanation of dangerous driving but does not answer the charge. Johnson then changed his plea to guilty and, a formal verdict having been given by the jury, was fined £75, to be paid on or before April 7, 1960, or in default six months' imprisonment. He was disqualified from holding or obtaining a driving licence for three years and his licence was indorsed.

[C. B. ORR, *Barrister-at-Law*.]

Commentary. It is submitted that careless and dangerous driving are crimes requiring proof of negligence and, as such, should be distinguished from offences of absolute prohibition, properly so called. Where an act is absolutely prohibited, not only need no *mens rea* be proved, but it is no defence for the accused to show that he took all proper care and was guilty of no negligence: see, *e.g.*, *R.* v. *Bishop* (1880) 5 Q.B.D. 259; *Hobbs* v. *Winchester Corporation* [1910] 2 K.B. 471; *Cundy* v. *Le Cocq* (1884) 13 Q.B.D. 207 (and *cf.* R. M. Jackson, 6 C.L.J. 83, 87, and Glanville Williams, *Criminal Law*, § 70). It is submitted, however, that it would be a defence for an accused motorist to show that he behaved throughout as a careful and prudent driver, even if his driving in fact caused danger to the public. This, it should be emphasised is not to impose a subjective test—*i.e.*, no evidence as to the accused's state of mind is necessary. What must be proved is that the accused's *conduct* failed to measure up to an objective, external standard—that of the careful and prudent driver. Counsel's example of the practical joker who reverses the signs is instructive. The careful and prudent driver, misled by these signs into driving the wrong way down a one-way street, would certainly be driving in a manner dangerous to the public; and, if the offence were really one of absolute prohibition, he would be guilty of it. But it is submitted that—as prosecuting counsel seems to have accepted—he should certainly be acquitted.

If, then, the accused in the present case really *reasonably* thought he was driving on a dual carriageway, he ought to have been acquitted; not because of his actual state of mind, which was irrelevant, but because, if his belief was reasonable, a reasonable man in the same circumstances would presumably have driven in the manner in which the accused did.

Dangerous driving—Road Traffic Act, 1956, *s.* 8*—evidence of drink —whether admissible*

R. v. Norrington

Essex Assizes: Cassels J.: March 2, 1960.[10]

The prosecution sought to adduce evidence of the alcohol content of the defendant's urine in a charge under section 8 of the Road Traffic Act, 1956. There was no other evidence of drink. It was argued by the defence that dangerous driving was an objective test and that evidence as to drink was both irrelevant and prejudicial. If drink was to be relied upon the defendant should be told so at the time and be given a chance of being examined by his own doctor. The court was referred to the two cases cited in [1960] Crim.L.R. 135–137. Cassels J. excluding the evidence said: " Suppose in a case like this, it is shown to the jury that the defendant was under the influence of drink. That evidence could surely be given in a charge under section 8. . . . However, I have to consider the prejudicial effect of this evidence. . . . It would be better in practice, if the prosecution is going to rely on the fact that the driver of the car is in an intoxicated condition, then the charge should be manslaughter and not a charge under section 8. If the defendant is charged with manslaughter then a second count of driving under the influence of drink can be inserted in the indictment. The rule should be that where drink is relied upon by the prosecution the charge should be manslaughter and the defendant be told at the earliest opportunity. In the circumstances of this case, I shall exclude this evidence. . . ."

[JOHN RYMAN, ESQ., *Barrister-at-Law.*]

Commentary. In the commentary on the two cases referred to it was submitted that evidence, that a person accused of dangerous driving has been drinking, is so slightly relevant to the issue of the manner in which he drove his car, that it ought to be excluded. It would seem that in excluding the evidence in the present case, Cassels J. was laying down no rule of law but simply exercising that discretion to exclude prejudicial evidence, even if it is technically admissible, which belongs to every judge in a criminal case. Technically, therefore, there may be no conflict between this and the earlier cases: but, in practice, the decisions leave a trial judge in something of a dilemma as to whether he should admit evidence of drinking on dangerous driving charges. It is unfortunate therefore that there is no authoritative ruling by a higher court on the point.

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[10] For the prosecution: *Gerald Hines* and *John Turner* (instructed by County Solicitors, Essex). For the defence: *Michael Havers* (instructed by Gerald Byers, Lewis & Co.).

The learned judge's remarks regarding manslaughter are, with respect, puzzling. In *R.* v. *Carr* (1934) 24 Cr.App.R. 199, the Court of Criminal Appeal held that it was wrong to try a charge of driving under the influence of drink together with a manslaughter charge, even though counsel for the defence consents to such a course being taken. Is the point of Cassels J.'s suggestion simply to give notice to the accused that evidence of drinking will be relied on, though both counts will not be tried together? Moreover, the prejudicial effect of the evidence is not less on a manslaughter charge, and it is not easy to see that its logical relevance to the issue is greater on a charge of manslaughter by motor-car than on a charge of causing death by dangerous driving.

SENTENCE

Grounds of appeal—breach of Prison Rules

R. v. Semple

Court of Criminal Appeal: Streatfeild, Donovan and Thesiger JJ.: March 21, 1960.[11]

In this case the court, refusing an application for leave to appeal, *held* that an alleged breach of the Prison Rules, *i.e.*, that the appellant was not receiving corrective training to which he was sentenced, was not a ground of appeal against sentence, but was a matter for the Home Secretary. The appellant, however, would not be penalised by the usual rule with regard to the lapse of time pending the appeal: that time would count towards his sentence. [H. P.]

SHOPBREAKING

Larceny—goods found outside shop

See R. *v*. BRODRICK, p. 426, *ante*.

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[11] The applicant did not appear and was not represented. The Crown was not represented.

TRIAL

Allocutus—omission—effect

R. v. Ling

Court of Criminal Appeal: Lord Parker C.J., Sachs and Ashworth JJ.: April 4, 1960: *The Times*, April 5, 1960.[12]

L. had been convicted at quarter sessions of larceny and receiving. On appeal to the Court of Criminal Appeal the question was raised as to the effect of the omission of the *allocutus*. Counsel for the appellant said that the deputy clerk of the peace had failed to call on the accused to say whether the judgment of the court should be passed on him. Counsel said that in two early cases of treason (*Geary*, 2 Salkeld 630, and *Speke*, 3 Salkeld 358) and also in a Canadian case (*Cayotte* v. *The Queen* (1887) 13 Quebec L.R. 214) the omission of the *allocutus* had been held to be fatal. This omission might have effect (1) to make the whole trial void as the omission of an essential formality; (2) to make the sentence void, when the proper procedure might be to send the appellant back for sentence; or (3) so that a *venire de novo* should proceed.

Lord Parker C.J., in course of argument, said that the court were minded to reduce the sentences, but that an important point of law had been raised and, if that were persisted in, the court would take time to consider the whole matter. However, it had been conceded that the result would be that the appellant would go back to quarter sessions to be sentenced afresh.

Counsel for the appellant then said that, in the circumstances, he would not persist in the point. The judgment of the court was then given dismissing the appeal against conviction, but reducing the sentences. [H. P.]

Commentary. The *allocutus* is required in trials for treason and felony but not for misdemeanour. It seems that, historically, its purpose was to allow the defendant to move in arrest of judgment or to plead pardon or benefit of clergy. *Cf. R.* v. *Donovan* (1928) 21 Cr.App.R. 20, where the court seems to have attached little or no importance to the fact that a prisoner was not allowed to make a statement when called upon after verdict in a trial for felony.

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[12] For the appellant: *Raymond Sears* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *J. D. Alliott* (instructed by the Town Clerk, Brighton).

Discretion of judge to discharge jury who fail to agree—autrefois acquit

R. v. Randall

Court of Criminal Appeal: Lord Parker C.J., Hilbery and Pearson JJ.: December 14, 1959.[13]

R. was tried on an indictment charging stealing a drum of cable, alternatively receiving it. The jury found R. not guilty on each count. After the verdicts the clerk of the peace asked: " And are they the verdicts of you all? " to which the foreman of the jury replied: " Not all, but of the majority." The deputy chairman refused to accept these verdicts and discharged the jury. R. was later tried again and convicted of stealing. On appeal to the Court of Criminal Appeal:

Held, dismissing the appeal, that it was quite clear that on the second trial R. could not plead *autrefois acquit*. It was said on behalf of the appellant that the jury in the first trial ought to have been sent back with an invitation to think again and try and agree; and that if that had been done R. might have been acquitted. But it was always a matter of the discretion of the trial judge whether he discharged the jury or sent them back, and there was ample reason in the present case in the interests of the defendant himself to exercise that discretion by discharging the jury. In any event the discretion of the judge to discharge the jury was not, as had been settled in *R.* v. *Lewis* (1909) 2 Cr.App.R. 180, subject to review by this court. Accordingly, the appeal would be dismissed. [H. P.]

Inconsistent verdicts—identical defences on two charges—one accepted, one rejected

R. v. Lewis

Court of Criminal Appeal: Streatfeild, Donovan and Thesiger JJ.: March 21, 1960.[14]

L. was indicted at quarter sessions for (i) stealing a van and (ii) obtaining property and money by false pretences from Y., the false pretences being that he was the owner of the van. L.'s defence to the charges was that he did not steal the van, because he never had any intent permanently to deprive the owner: he had lent the van to Y. in exchange for another van, but he had never represented to Y. that it was his own property. The jury acquitted L. of stealing but found him guilty of obtaining by false pretences. On appeal to the Court of Criminal Appeal:

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[13] For the appellant: *H. Tudor Price* (instructed by Hanchett, Copleys & Hales). For the Crown: *R. H. K. Frisby* (instructed by A. Russell Jones & Co., Welwyn Garden City).

[14] For the appellant: *B. W. C. Twigg* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Peter Hopkin Morgan* (instructed by J. A. Fussell, Cardiff).

Held, allowing the appeal, that there might be cases where a man did not steal a chattel but nevertheless obtained money by falsely pretending that it was his; but that was not this case. Here there were identical defences on two charges, one of which was accepted and the other rejected by the jury. Further, the jury had not been directed about the ingredients of the offence of false pretences. On these two grounds the conviction must be quashed.

[H. P.]

Interruptions of chairman of quarter sessions—effect

R. v. Dowell

Court of Criminal Appeal: Lord Parker C.J., Cassels and Ashworth JJ.: February 1, 1960.[15]

D. was convicted at quarter sessions of an assault occasioning actual bodily harm. On appeal to the Court of Criminal Appeal:

Held, dismissing the appeal, that the only matter which deserved comment was the fact that when the appellant was giving his evidence-in-chief he had been subjected to a number of interruptions from the chairman. They had not been interruptions which had assisted the appellant in any way and, in the opinion of this court, they had been injudicial both as regards quantity and quality. It was imperative, as the courts had said on many occasions, that a witness should be left, particularly in examination-in-chief, to his own counsel so that he might bring out his story and do himself justice. That was true in both civil and criminal cases. However, the interruptions in the present case had not prevented the appellant from putting forward his defence, and the truth of the matter was that the jury had preferred the evidence of the prosecution witness. Accordingly, the appeal would be dismissed. [H. P.]

Commentary. The Court of Appeal ordered a new trial in a civil case when the interruptions of the trial judge, though actuated by the best of motives, were excessive and ill-timed, with the result that insufficient primary facts had been elicited to enable the appellate court to determine the issues as to liability: *Jones* v. *National Coal Board*

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[15] For the appellant: *S. J. Wilson Price* (instructed by Mark & Lemon). For the Crown: *Daniel A. Hollis* (instructed by The Solicitor, Metropolitan Police).

[1957] 2 Q.B. 55. Denning L.J. said: ". . . it is for the advocates, each in his turn, to examine the witnesses and not for the judge to take it on himself lest by doing so he appear to favour one side or the other. . . . And it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost: see *R.* v. *Clewer* (1953) 37 Cr.App.R. 37. The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the role of an advocate; and the change does not become him well."

In *R.* v. *Clewer* (above) a criminal conviction was quashed, although there was ample evidence on which a jury could properly convict, on the ground that defending counsel never had an opportunity of putting his defence fairly before the jury because of the frequency and nature of the interruptions by the judge. Lord Goddard C.J. emphasised that "the first and most important thing for the administration of the criminal law is that it should appear that the prisoner is having a fair trial and that he should not be left with any sense of injustice on the ground that his case has not been fairly put before the jury." It is immaterial that the defence appears to the judge to be fantastic or devoid of merit: "Everyday experience shows that juries sometimes accept defences which appear highly improbable to judges, and which would not be accepted if the decision rested with the judge alone."

Prosecution witness—previous convictions—list supplied to defence counsel

R. v. Chambers and Wilson

Sheffield Winter Assize: Edmund Davies J.

The two accused were charged for that they together with one E. conspired to prevent the course of public justice. E., who had previous convictions was called as a witness for the prosecution, who refused to supply the defence with a list of those previous convictions. Upon application by defending counsel the learned judge ordered that a list be supplied, on the ground that otherwise the defence might be placed in the dilemma of putting character in issue without any precise knowledge of the value of such a course.

[A. L. MYERSON and H. H. OGNALL, *Barristers-at-Law.*]

Commentary. Under the Criminal Evidence Act, 1898, s. 1 (*f*), a prisoner who makes imputations on the character of the prosecutor or the prosecution witnesses may, if he elects to give evidence, be cross-examined as to his own bad character. It is, therefore, very important for the defence to know just how bad the record of the prosecutor or his witnesses is.

In *R.* v. *Collister and Warhurst* (1955) 39 Cr.App.R. 100 it was held that it is the prosecution's duty to inform the defence of any convictions known against the prosecutor, but there is no duty on the police to examine the records "to see whether possibly there exists anywhere in the country any matter which might affect the character of a witness." Thus the convictions in that case were not to be upset simply because the defence did not know that the prosecutor, in the course of his public examination in bankruptcy, had admitted that he had on occasion told lies in order to get loans of money. The prosecution did not know this fact either. If they had done so, it would, presumably, have been in the spirit of the rule to inform the defendant.

It is clear that the rationale of the rule requires that the principles applied to the prosecutor's character in *Collister* should equally apply to the character of witnesses for the prosecution.

WEIGHTS AND MEASURES

Merchandise Marks Act, 1926, s. 6—consequences of conviction of employee

Langstaff and Lawrence v. Hedley

West Riding of Yorkshire Quarter Sessions Appeals Committee (G. de P. Veale, Esq., Q.C., Chairman): March 14, 1960.[16]

Langstaff, an agricultural haulage contractor, was charged with applying a false trade description to goods, namely a load of manure, contrary to Merchandise Marks Act, 1887, s. 2 (as amended by Merchandise Marks Act, 1953). The false description alleged was that the load weighed 8 tons 6 cwt., whereas in fact it weighed 4 tons 7 cwt. He summoned his employee, Lawrence, under Merchandise Marks Act, 1926, s. 6, alleging that Lawrence was the actual offender and the offence had been committed without his consent, connivance or wilful default. At the hearing before the magistrates Langstaff pleaded not guilty and Lawrence guilty. The magistrates, having heard the evidence, found Langstaff guilty and fined him £50 and Lawrence £20. Langstaff appealed against both conviction and sentence and Lawrence against sentence.

Before the Appeals Committee, counsel for Langstaff conceded that the conviction must stand, since Langstaff was vicariously liable for his employee's offence. He contended, and counsel for the respondent conceded, that Langstaff should be exempt from any penalty.

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[16] For the prosecutor respondent: *J. W. Mellor* (instructed by Catterall, Pell & Moxon, Wakefield). For Langstaff: *C. Raymond Dean.* For Lawrence: *John M. Collins* (both instructed by Fox, Hayes & Co., Leeds).

Held, that quarter sessions were bound to remove the penalty imposed on Langstaff and allow his appeal with costs. The magistrates had convicted the servant: from that it necessarily followed that the employer had satisfied them of the matters which he was obliged to prove to bring himself within the protection of Merchandise Marks Act, 1926, s. 6. If he had not so satisfied them, they should not have convicted the servant. (The appeal of Lawrence against sentence was dismissed.)

[JOHN M. COLLINS, *Barrister-at-Law*.]

Commentary. By section 6 of the Merchandise Marks Act, 1926, an employer or principal charged with an offence under the Act may, on giving three days' notice to the prosecution, bring before the court any person whom he charges as the actual offender. If the employer can then prove (a) that he used due diligence to enforce compliance with the Act and (b) that the other person committed the offence " without his consent connivance or wilful default," then the other person may be convicted and the employer shall be exempt from any penalty.

If the employer only proves (b) and not (a) it would seem that the servant may not be convicted under this section. Contrast the position under section 113 of the Food and Drugs Act, 1955, where, in similar circumstances, both may be convicted.

Principles of Punishment

Sentences in the Court of Criminal Appeal

Prepared by HENRY PALMER, *Barrister-at-Law*

Imprisonment

In R. *v.* KENNEDY the court (Lord Parker C.J., Sachs and Ashworth JJ.: April 4, 1960) varied a sentence of borstal training to one of imprisonment for nine months. K. had pleaded guilty at a magistrates' court to stealing a watch (valued at £14) from his father's house, and he was sentenced by quarter sessions. K., who was a young man of twenty years of age, had a bad record including a sentence of borstal training in 1957 for stealing cheques. The prison commissioners had reported that K. was: " Slow to settle to his training and was constantly in trouble for breaches of discipline. At length, however, he became more co-operative and made steady improvement and he worked well at a labouring task. . . . The prison commissioners do not propose to issue an order of recall and consider that a fresh sentence of borstal training is unlikely to be of advantage." The court stated that the choice lay between sending a young man back to borstal when there was a recommendation that it was unlikely to be of advantage and sending him to prison, although he was under twenty-one years of age. In the judgment of the court it was better, in those circumstances, to send him to prison. It was wrong to fill up any vacancy there might be for borstal training with a young man who was not going to benefit from it, and there seemed to be no other way of dealing with this offender otherwise than by sending him to prison. Accordingly, a sentence of nine months' imprisonment would be substituted for the sentence of borstal training.

In R. *v.* GILL the court (Lord Parker C.J., Ashworth and Salmon JJ.: April 12, 1960) reduced a sentence of seven years' imprisonment to one of four years' imprisonment. G. had pleaded guilty at assizes to wounding a girl. G., who was a man of twenty-three years of age, was previously of good character. The circumstances of the offence were that G., who was a Sikh, had formed an association with the girl. The girl had previously sworn on the Bible that she would remain true to him, and he had sworn on the Bible that if she was not he would disfigure her. G. said that when he found that the girl was not sincere with him he felt he had to observe his oath. In fact, G. slashed the girl's face with a pocket knife, inflicting a wound some two-and-a-quarter inches long and deep enough to penetrate the mouth. The court stated this was a perfectly deliberate act and a horrible crime but, nevertheless, there were mitigating circumstances. G. was previously a man of perfectly good character and the act was done in broad daylight. G. had immediately given himself up. In the circumstances this court had concluded that the sentence of seven years' imprisonment was too severe and, accordingly, a sentence of four years' imprisonment would be substituted.

Preventive detention

In R. *v.* WRIGHT the court (Lord Parker C.J., Sachs and Ashworth JJ.: April 4, 1960) reduced total sentences of eight years' preventive detention to sentences totalling four years' imprisonment. W. was convicted at quarter sessions of four offences of obtaining credit by fraud and pleaded guilty to making an untrue statement for procuring a passport. Twenty-one other cases were taken into consideration, of which twenty concerned obtaining goods by worthless cheques and one was obtaining credit by fraud. W., who was a man of forty-one years of age, had four previous convictions for serious crime, the first of which was committed twenty-two years previously: the last three were three years' penal servitude in 1948 for setting fire to a ship and attempting to obtain insurance money, two years' imprisonment in 1953 for endeavouring to persuade someone to murder and eighteens months' imprisonment in 1956 for five offences of fraudulent conversion. He was last released from prison in 1957 and the present offences began in May, 1958. These offences concerned obtaining goods of about £7,000 in value on credit, and W., when others concerned were arrested and charged, sought to leave the country by means of a passport procured by means of an untrue statement. The court stated that W. was undoubtedly a very dangerous man but the question was whether he was also a habitual criminal to whom a sentence of preventive detention was apposite. Although W. had been found guilty of a number of serious offences since 1948, he did not come within the category of persons who should be sentenced to preventive detention. These were serious offences and the proper sentences were those which would total four years' imprisonment.

In R. *v.* HIBBERT the court (Lord Parker C.J., Ashworth and Salmon JJ.: April 11, 1960) reduced a sentence of eight years' preventive detention to one of two years' imprisonment. H. had pleaded guilty at a Crown Court to forgery of a cheque, and one other case being taken into consideration (selling goods in his possession on hire-purchase). H., who was a man of fifty-eight years of age, had twelve previous convictions including a sentence of four years' imprisonment for larceny and embezzlement. He was last released from prison in October 1956 and the present offence was committed in July 1959. The court stated that for two-and-a-half years H. had succeeded in keeping straight and had worked as a salesman and as a machinist. Prima facie, therefore, this was not a case where one could say that H. was a habitual criminal. Accordingly, a sentence of two years' imprisonment would be substituted for the sentence of eight years' preventive detention.

Conditional discharge

In R. *v.* DONOVAN the court (Lord Parker C.J., Ashworth and Salmon JJ.: April 12, 1960) varied a sentence of nine months' imprisonment to a conditional discharge. D. had pleaded guilty at quarter sessions to larceny as a servant. D., who was a man of twenty-five years of age, had no previous convictions prior to May 1959 when he was convicted and fined for stealing cigarettes and making use of counterfeit coins. At the time of that offence D. made a statement admitting the theft of scrap metal belonging to the Royal Air Force. About eight months later he was dealt with by quarter sessions for that theft and the present sentence was passed. The court stated that D. was a man who had shown quite conspicuous ability in the Royal Air Force, and it was his ambition to carve out a career in that service. Undoubtedly this offence was serious but the quarter sessions seemed to have taken the view that the theft had taken place after May 1959. That was not correct and it was at least doubtful that D. would have been sent to prison if the situation had been fully appreciated. In particular, a sentence of imprisonment would mean that D. could not continue his career in the Royal Air Force. In the circumstances a conditional discharge would be substituted for the sentence of nine months' imprisonment.

Acts and Orders *

Children and Young Persons

The contributions to be made by the local authority named in an approved school order to the expenses of the managers of an approved school throughout the time, except in certain special circumstances, during which the person to whom the order relates is under the care of those managers, are raised from £4 11s. a week to £5 1s. 6d. a week. The 1959 Regulations (S.I. 1959, No. 548) are amended accordingly. Operative April 1, 1960. APPROVED SCHOOLS (CONTRIBUTIONS BY LOCAL AUTHORITIES) REGULATIONS, 1960 (S.I. No. 551).

Food and Drugs

Seasonal reductions are made in the permitted maximum price of milk on sale in England and Wales, and milk supplied from an automatic vending machine is now exempted from maximum price control. A similar Order applies to Northern Ireland. Both operative April 3, 1960. MILK (GREAT BRITAIN) (AMENDMENT) ORDER, 1960 (S.I. No. 554) (3d.); (NORTHERN IRELAND) (AMENDMENT) ORDER, 1960 (S.I. No. 555) (3d.).

Section 37 (1) of the Food and Drugs Act, 1955, relating to the compulsory use of special designations for retail sales of milk in any area of England and Wales in respect of which the Minister of Agriculture, Fisheries and Food makes an Order, is brought into operation in the areas specified in the Schedule to the Order. These areas which are specified exactly in the Schedule, are in the region of and include (1) the Borough of Berwick-upon-Tweed;

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* Prepared by F. MAURICE DRAKE, *Barrister-at-Law*.

(2) the Urban Districts of Barnoldswick, Earby, Silsden and Skipton; (3) the Boroughs of Chard, Honiton, Yeovil and areas in and near Crewkerne, Ilminster and Axminster; (4) the districts of Leek and Cheadle; and (5) the Boroughs and neighbourhood of Denbigh and Ruthin. Operative April 25, 1960. MILK (SPECIAL DESIGNATIONS) (SPECIFIED AREAS) ORDER, 1960 (S.I. No. 678) (3d.).

For penalties for contraventions see section 106 of the Food and Drugs Act, 1955.

London Traffic

Previous Regulations relating to waiting and loading restrictions in certain streets in Westminster and St. Marylebone are revoked and re-enacted with amendment. The revoked Regulations (S.I. 1958, No. 1094 as amended by S.I. 1959, No. 1077 (Wesminster); and S.I. 1959, No. 1078 as amended by S.I. 1960, No. 276 (St. Marylebone)), were complementary to the Parking Places (Westminster) (No. 1) Order, 1958, and the Parking Places (St. Marylebone) Order, 1959 (which designate parking places on certain highways in areas of Westminster and of St. Marylebone at which charges may be made by the local authority for vehicles left in the parking places) by imposing restrictions on the sale of goods from vehicles and on the waiting, loading and unloading of vehicles in those parts of streets in those areas not designated as parking places by the above-mentioned Orders.

These regulations are also complementary to the Parking Places (Westminster) (No. 1) Order, 1959 (S.I. 1959, No. 2105), which designates parking places on several additional highways in Westminster at which charges may be made for vehicles left in the parking places. Operative April 4, 1960. LONDON PARKING ZONES (WAITING AND LOADING) (RESTRICTION) REGULATIONS, 1960 (S.I. No. 594) (1s. 9d.).

For penalties for contraventions see regulation 6 of these Regulations.

The London (Waiting and Loading) (Restriction) Regulations, 1958 (S.I. 1958, No. 660), as amended, are further amended so that the restrictions on the sale of goods from vehicles and on the waiting, loading and unloading and use for the purposes of advertisement of vehicles in certain streets in the City of London, in Metropolitan Boroughs and other districts within the London Traffic Area, no longer apply in certain streets in the City of Westminster. In the streets where these restrictions no longer apply other restrictions on vehicles as to waiting, loading and unloading now have effect by virtue of the London Parking Zones (Waiting and Loading) (Restriction) Regulations, 1960 (S.I. No. 594), set out above, or the

Parking Places (Westminster) (No. 1) Order, 1959 (S.I. 1959, No. 2104). Operative April 4, 1960. LONDON (WAITING AND LOADING) (RESTRICTION) (AMENDMENT) (No. 2) REGULATIONS, 1960 (S.I. No. 595) (4d.).

The following Orders have been made detailing prescribed routes: S.I. Nos. 549 (Harrow) (2d.); 593 (Westminster) (3d.).

The following Orders have been made prohibiting waiting: S.I. No. 491 (Addlestone and Chertsey) (3d.); 670 (Hatfield) (3d.).

The following Order has been made relating to weight restriction: S.I. No. 481 (Great Amwell) (2d.).

Road Traffic

The ROAD TRAFFIC ACT, 1960 (8 & 9 Eliz. 2, c. 16) (10s. 6d.) consolidates with corrections and drafting improvements previous enactments relating to road traffic. The consolidated enactments, which are set out in Sched. 18 to this Act include the Road Traffic Acts of 1930, 1934, 1937 and 1956 and the London Traffic Act, 1924, as well as a large number of provisions in other enactments which relate to road traffic. Operative September 1, 1960, except for certain provisions specified in Part I of Sched. 20, which come into operation in accordance with the provisions of Part II of that Schedule. The Act does not extend to Northern Ireland.

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 11 New Fetter Lane, London, E.C.4." The questions of readers only are answerable in the Review. All questions should be submitted in triplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

69. *Larceny or false pretences.*

I find it difficult to reconcile the answer to problem no. 66 [1960] Crim.L.R. 223 with what is said in *Stone* (p. 1471–3) under the heading "Taking by any trick."

At the foot of page 1472 it is said that

> "The rule seems to be that where the giver intends to pass the property (or a right to pass it to a third person) to the receiver, being induced thereto by some representation made by the receiver not affecting the substance of the transaction itself, there is a real but not a valid consent, and the agreement is voidable and not void, and the offence is false pretences and not theft. What affects the substance of the transaction is

> difficult to define, but it appears to include cases where a person fraudulently gets delivery as in right of another person either by pretending to be that person or to be authorised by him."

In the problem, B's actions appear to come clearly within the last sentence of the quotation above, and thus, if *Stone* and my reading of it are correct, to amount to larceny and not false pretences.

The answer mentions that credit was given to A, and not to B. Is it not equally true that the attendant intended to confer ownership of the petrol upon A, and not B? [A correspondent.]

ANSWER

This question of what fraud affects the substance of the transaction is an extremely vexed one and has been the subject of voluminous case-law and text writing, both in contract and in crime. Nevertheless, *Stone's* assertion that the substance of the transaction is affected where a person fraudulently gets delivery as in right of another person, either by pretending to be that person or to be authorised by him, cannot be accepted as it stands and without qualification. *Phillips* v. *Brooks* [1919] 2 K.B. 243 is a case the correctness of which has never been doubted, and there, although the pretence made by the fraud was that he was some other well-known person, it was held that the transaction was voidable only, not void—so that false pretences would be the appropriate charge. Moreover, in *Dennant* v. *Skinner* [1948] 2 K.B. 164 the pretence was that the accused was authorised by some other person and yet it was held that this did not affect the substance of the transaction. It is true that both these cases were civil cases, but in each case the result turned on the distinction between larceny by trick and obtaining by false pretences, and moreover it appears from a reading of the reports that in each case the rogue had already been convicted in a criminal court of the latter offence.

On the facts set out in the Practical Problem, a more convincing reply to a charge of obtaining would be that ownership in the petrol had already passed before any representation was made, so that it cannot be said that he obtained the petrol " by " a false pretence. Nevertheless, this point is often ignored in practice—see, for instance, *Dennant* v. *Skinner* (above).[1] [D. W. E.]

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[1] See Cheshire and Fifoot, *Law of Contract,* 4th ed., p. 163 *et seq.*; *Kenny, Outlines of Criminal Law,* 17th ed., p. 257 *et seq.*

Letters to the Editor

Scottish newsletter: "Frivolous appeals"

Sir,

The author of "A Scottish Newsletter" appearing in your April 1960 number, discussing the increasing number of criminal appeals in Scotland writes (at p. 250): "This great increase in the number of appeals has drawn disapproval from the Bench. Lord Justice-General Clyde warned applicants that the Appeal Court might increase sentences against prisoners who submitted frivolous applications asking for leave to appeal." Your correspondent then goes on to report that ". . . at the Autumn sittings of the court, two applicants had their sentences increased."

It appears that the two unfortunate applicants were the first victims of the court's wrath, and were punished, not for the offence for which they had already been sentenced, but for a new (and to my mind somewhat novel) offence—namely—attempting to exercise their right of appeal.

I do not wish to seem presumptuous, but I would like to be informed if any authority exists (statutory or otherwise) in Scotland for what seems to me to be a marked departure from traditional standards in the administration of criminal law.

Yours faithfully,

George J. D. Taylor, *Solicitor.*

Saskatoon, Saskatchewan.

["Scots Advocate" writes: "I agree that the merits of an appeal are or should be relevant to the question of whether sentence should be increased or not. My paraphrase of the Lord Justice-General's remark was probably misleading. The present position in Scotland is this. Under the Criminal Appeal (Scotland) Act, 1926, the court has not only power to alter the sentence, but may declare that the period between the passing of sentence on the appellant and the date of the hearing of his appeal shall not count towards the sentence, and to order that the sentence should only run from the date when the appeal was dismissed. The Lord Justice-General indicated that in future more use might be made of this power, and this is what has happened. The result is that the period of confinement of the appellant can be increased by two or three months. This power is now proving to be a useful weapon for the court in preventing the abuse of process by frivolous appeals. It would not, therefore, be strictly true to say that the court has given an added term of imprisonment where an appeal was thought to have no merits."]

Books and Periodicals

Book reviews:

Alibi for a Judge. By Henry Cecil. London: Michael Joseph. 1960. 206 pp. 13s. 6d. net.

Mr. Henry Cecil's latest frolic with lawyers is less happy than his previous books. The accent throughout the book is on doubt, and the result is disturbing rather than humorous. In the circumstances it is fortunate that the character of Carstairs J. is not so well drawn that one believes in him immediately or even at all.

A. L. N.

Memorable Irish Trials. By Kenneth E. L. Deale. London: Constable & Co. 1960. 190 pp. 21s. net.

This book contains accounts of six murder trials held at Green Street Courthouse, the Dublin equivalent of the Old Bailey. All the accounts will probably be new to English readers; Judge Deale has presented them lucidly, without the addition of a melodramatic style which usually characterises accounts of this kind. The seventh "trial," which this reviewer found the most interesting, is an account of the Commission of Inquiry appointed to investigate the theft of the Irish Crown Jewels in 1907. Their investigation came nowhere near solving the mystery, which is still unsolved.

A. L. N.

Books received:

The Murder and The Trial. By Edgar Lustgarten. London: Odhams Press. 1960. 312 pp. (21s. net.)

Guenther Podola. By Rupert Furneaux. London: Stevens. 1960. 319 pp. (18s. 6d. net.)

Plutocrats of Crime. By Percy Smith. London: Frederick Muller. 1960. 216 pp. and (index) 7 pp. (18s. net.)

Hands of Terror. By Leonard Gribble. London: Frederick Muller. 1960. 228 pp. (16s. net.)

Stone's Justices Manual. Edited by James Whiteside and J. P. Wilson. London: Butterworth. 1960. 2 vols. 3141 pp. and (index) 237 pp.

Sir Travers Humphreys—A Biography. By Douglas G. Browne. London: George Harrap. 1960. 378 pp. and (index) 6 pp. (22s. 6d. net.)

Readers' digest:

Contempt: Trial by newspaper: 110 *Law Journal* 264.

Contempt: Lawyers and contempt: 104 *Solicitors' Journal* 277.

Forensic: The detection of accidental gas poisoning: 33.2 *Police Journal* 90.

Magistrates: A recording experiment: 124 *Justice of the Peace Review* 266.

Magistrates: Summary trial of breaking offences: 124 *Justice of the Peace Review* 248.

Road Traffic: Alcoholic Intoxication and the Motorist: 16 & 17 *Scots Law Times* 77.

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Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review,* 11 *New Fetter Lane, E.C.*4. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

THE
CRIMINAL LAW
REVIEW

July 1960

Police evidence before disciplinary tribunals

The Departmental Committee on Powers of Subpoena of Disciplinary Tribunals [1] was asked " in particular to consider whether subpoenas should be issuable to secure the production before such tribunals of evidence obtained by police officers in the course of criminal investigations."

On this question, as on the wider question with which they were concerned, the Committee took as their guiding principle the proposition " that in the administration of justice it is essential that the court or tribunal should have before it all the relevant evidence that is available." Disciplinary tribunals are entrusted with judicial duties and with the power to impose most severe penalties; accordingly the guiding principle, wherever it is not overwhelmed by some paramount consideration of public policy, should apply to them as to other judicial bodies.

The Committee could fiind no argument based on public interest to justify exceptional treatment of police evidence. The policeman is but " a citizen in uniform." Where he hears or sees something which may be material to an inquiry before a disciplinary tribunal, there is no reason why he should not be required, on subpoena, to say what he has heard or seen. If this were not so, either side, or indeed the public, might be able to complain of a failure of justice.

It is a truism (though properly added by the Committee) that the production of police evidence before tribunals should be " subject to all proper exceptions." The witness may be instructed to claim Crown privilege; informers' names must not be divulged; objections of hearsay, irrelevance and so on may be taken. And one arrives at this point at the delicate topic of conversations overheard on the telephone (to put it neutrally). It was this topic, arising out of the General Medical Council's inquiry in the case of Dr. Fox, that caused the appointment of the Committee.

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[1] Report published as Cmnd. 1033.

The Committee mentioned that a policeman might be "invited or allowed to 'listen in' to a telephone conversation" and could see no reason why he should not be required to give evidence before a tribunal of what he heard. We respectfully agree. In truth this particular question was not as an independent matter before the Committee, and they use it merely as an example. It may be, in fact, that public sentiment is hotly opposed to the police having any power to repeat what they have overheard on the telephone, even if permitted to listen in by one party to the conversation. The emotions aroused by this matter may be (we hope they are not) strong enough to warrant special legislation. But as the law now stands there is no ground for discriminating against the type of evidence tendered in the *Fox* case. The Committtee gave the point all the attention that, at present, it deserves.

Clerks retiring with justices

It is a paramount principle of English law that not only should justice be done but that it should manifestly be seen to be done. This question very often arises in relation to the problem of when justices' clerks should retire with the justices, and how they should be requested to do so. In 1953 Lord Goddard C.J. issued a Practice Direction[2] clearly indicating the circumstances under which clerks should retire and the points upon which their advice could be sought.

The question was recently considered in *R.* v. *Consett Justices, ex p. Consett Iron Company, Ltd.*[3] by a Divisional Court (Lord Parker C.J., Byrne and Ashworth JJ.), which on an application for certiorari quashed convictions of a company of offences under section 130 (1) of the Factories Act, 1937. The clerk retired with the justices when they were thought to be considering questions of fact; counsel for the company objected to this and the clerk is reported as having replied "I don't know what you are worrying about; this case is as dead as a dodo." It was taken that he was referring to the *East Kerrier* case.[4] When counsel again said that the clerk ought not to be concerned with findings of fact, the clerk replied: "Well, that is a matter of opinion."

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[2] [1953] 2 All E.R. 1306.

[3] *The Times,* May 14.

Lord Parker C.J. in his judgment referred to the case of *R.* v. *Camborne Justices, ex p. Pearce*, where the court had felt that the continued citation of the principle that justice must be seen to be done might lead to the erroneous conclusion that this was more important than that justice should be done. It is clearly important that this should not happen and it seems, in our respectful submission, that if justices' clerks paid more attention to making it quite clear that they are only advising justices on questions of law, or mixed law and the fact, that justice would be done as well as being seen to be done.

That sacred object the motor-car

Section 54 of the Metropolitan Police Act, 1839, says: "Every person shall be liable to a penalty not more than 40s., who, . . . shall, in any thoroughfare or public place . . . clean, make or repair any part of any cart or carriage . . ." A widow complained at a West London magistrates' court that the washing of a car in the mews where she lived had "disrupted her train of thought." The offending car cleaner was fined 10s. The magistrate said of her: "Here is someone who has made a complaint with great courage against that sacred object, the motor-car." Notice of appeal has been given.

Judicial appointments

Hugh Eames Park, Esq., Q.C., has been appointed Recorder of the City of Exeter. Mr. Park will relinquish his Recordship of the Borough of Penzance.

Norman Grantham Lewis Richards, Esq., O.B.E., Q.C., has been appointed Recorder of the Borough of Merthyr Tydfil.

Francis John Watkin Williams, Esq., Q.C., has been appointed Chairman of the Court of Quarter Sessions for the County of Anglesey.

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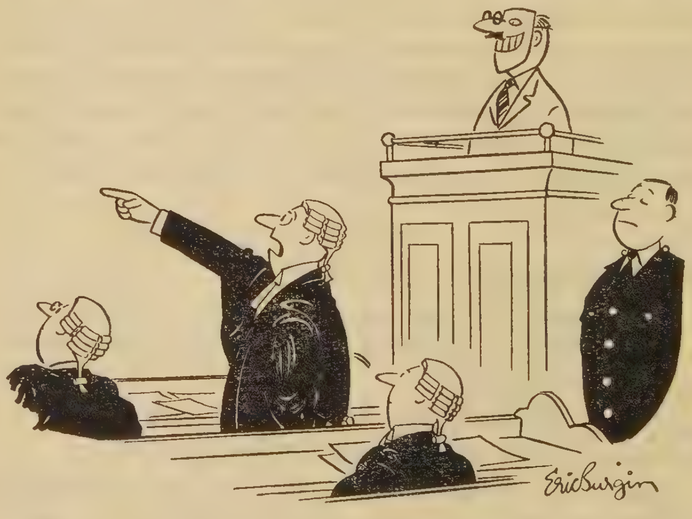
[4] *R.* v. *East Kerrier Justices, ex p. Mundy* [1952] 2 All E.R. 144.

His Honour Judge David Meurig Evans has been appointed Chairman of the Court of Quarter Sessions for the County of Cardigan.

Malcolm McGougan, Esq., has been appointed Deputy Chairman of the Court of Quarter Sessions for the County of Surrey.

Graham Russell Swanick, Esq., M.B.E., Q.C., has been appointed Deputy Chairman of the Court of Quarter Sessions for the County of Lincoln (Parts of Kesteven).



". . . and now Miss Chisholme, I want you to look round this court and see if you can recognise and point out to us the man known to you as Henry Crumpton."

Can the Prosecution allege that the Accused is Insane?

By H. A. SAMUELS, B.A.,

Lecturer in Law, University of Southampton

In his book, *The Criminal Law*, Dr. Glanville Williams, writing in 1953, says that the prosecution may not allege that the accused is insane,[1] and he criticises this proposition. It is submitted that this proposition may not be the law, or may no longer be the law.

Archbold[2] says: "Insanity being a matter for the defence, the onus of establishing it lies upon the prisoner. *R.* v. *Oliver Smith*.[3] The procedure that the defence should call any witness whose evidence is directed to that issue should be strictly followed, the duty of the prosecution being limited to supplying the defence with a copy of any report or statement of any prison medical officer who can give evidence for the defence. *R.* v. *Casey*." [4]

But it is to be observed that in *Casey* (*supra*) the defence of insanity was relied upon by the defence, and the difficulty arose because the prosecution called evidence of insanity, with the intention of assisting the defence as fairly as possible. Morris J., delivering the judgment of the court, stated: ". . . it is desirable to adhere to the procedure that the defence should in the first place call any witness directed to the issue of insanity, if the defence raise that issue."

In *Oliver Smith* the defence of insanity was set up both by cross-examination of the witnesses for the prosecution and by direct evidence by non-medical witnesses for the defence. No doctor was called by the defence, but the prison doctor was called by the prosecution to rebut the suggestion of insanity. In the course of the argument in the appeal (which was upon the grounds of misdirection on the defence of insanity, the appeal failing) Lord Alverstone C.J. said: "The question came up seven or eight years ago, when a practice arose of the Crown calling the prison doctor to prove insanity. All the judges met and resolved that it was not proper for the Crown to call evidence of insanity, but that any evidence in the possession of the Crown should be placed at the disposal of the prisoner's counsel to be used by him if he thought fit." These seem unqualified words but they were spoken in a case where the defence of insanity had been set up and the case was concerned with the proper procedure to be adopted by the prosecution in that event. The Lord Chief Justice said[5]: "The question is, is it right or is it not, where there is some suggestion of insanity, for counsel for the Crown to ask for a ruling as to whether or not there is evidence of insanity to go to the jury?" The court stated that the only general rule that could be laid down was that insanity, if relied upon as a defence, must be established by the defendant. It is submitted that this case is authority for the proper procedure to be adopted when the defence of insanity has been raised by the defence.

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[1] *The Criminal Law, General Part*, pp. 310–314, § 93.

[2] 34th ed., § 40, p. 18.

[3] (1910) 6 Cr.App.R. 19.

[4] (1947) 32 Cr.App.R. 91.

In *R.* v. *Charlson*[6] the accused attacked his ten year old son and threw him out of a window. There seemed no apparent reason or motive. The accused pleaded not guilty to causing grievous bodily harm. No plea of insanity was raised by the defence, and evidence was given by the prison medical officer on behalf of the prosecution that the accused was not suffering from insanity. There was evidence that the accused was suffering from a cerebral tumour which made him liable to motiveless outbursts of impulsive violence over which he had no control, and that during such outbursts he would not know the difference between right and wrong. The accused was acquitted. It is to be noted that in this case neither prosecution nor defence alleged that the accused was insane.

In *R.* v. *Kemp*[7] the accused was charged with causing grievous bodily harm to his wife. He was suffering from arteriosclerosis or hardening of the arteries. It is a well-recognised consequence of arteriosclerosis that it may lead to congestion of the blood in the brain due to a sudden rise of blood pressure, and as a result of such congestion the accused suffered from a temporary lapse of consciousness so that he was not conscious when he struck his wife. The prosecution argued that the case fell within the M'Naghten Rules and that, the accused having called evidence that he was not responsible for his acts, it was open to the prosecution to call evidence in rebuttal that the accused was suffering from insanity; it was further argued that on the evidence of the doctors called by the accused himself, he was insane within the meaning of the M'Naghten Rules. The defence, in support of a plea of not guilty, not raising the defence of insanity, argued that the case fell within the decision of *Charlson* (*supra*). The judge directed the jury that whether they accepted the medical evidence of the doctors for the defence or for the prosecution, on the whole of the medical evidence they ought to find that there was a disease of the mind within the M'Naghten Rules. What does this case decide? Does it decide that the defence really was putting forward the plea of insanity in so far as the defence doctors' evidence led the judge to direct the jury that this evidence, if accepted, in fact showed insanity? Does it decide that the prosecution can give evidence of insanity where the accused relies upon some form of mental abnormality, such as arteriosclerosis, to establish his defence of not guilty, as opposed to the case where the accused denies committing the act, for example, by setting up an alibi? Or does it decide that the prosecution can call evidence of insanity if they have such evidence available? And is the calling of such evidence a matter of discretion or obligation for the prosecution? The judge did not find it necessary in the course of his judgment on the legal submissions to make any comment upon the prosecution's competence or otherwise to allege insanity where such a defence was not raised, at all events not specifically raised.

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[5] p. 20.

[6] [1955] 1 W.L.R. 317; [1955] 1 All E.R. 859; 39 Cr.App.R. 37.

[7] [1956] 3 W.L.R. 724.

In 1957 came the Homicide Act. Section 2 (1) introduced the defence of diminished responsibility. Section 2 (2) says it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder; and it has been judicially determined that the burden of proof in such a case is upon the balance of probabilities: *R.* v. *Dunbar*.[8]

In *R.* v. *Bastian*[9] the accused was charged with murder. The killing was admitted. The defence set up was diminished responsibility, whereupon counsel for the prosecution contended that if such evidence was called he would be entitled to cross-examine to show that the degree of abnormality was such as to amount to insanity and to call evidence to that effect. Donovan J. said: "The view I take is that if the defence put in issue the state of a man's mind to show that he was suffering from such an abnormality of mind as produced diminished responsibility, the prosecution are under a duty, if they have evidence to support it, to cross-examine the witnesses for the defence to show that the accused was insane at the time when he committed the offence, and to call evidence to that effect." Later he said: ". . . if the prosecution say, in effect: 'This is not merely a case of diminished responsibility, it is insanity,' then the proper direction to the jury would be: 'It would be for the prosecution to satisfy you that the state of the accused person's mind went beyond what the defence are alleging, and that at the time of the offence he was insane within the legal meaning of that term.' " Thus here it was decided that the prosecution must call evidence of insanity if they have such evidence where the defence is diminished responsibility. Does this apply only where diminished responsibility is raised as a defence, or does it apply where the accused relies upon his state of mind to secure an acquittal, not to establish diminished responsibility, for example, by alleging that he was suffering from automatism? On the point of burden of proof must the prosecution prove insanity beyond reasonable doubt? The decision in *Bastian* (*supra*) was described by Professor J. C. Smith [10] as follows: " Nevertheless the decision is a realistic one for a verdict of manslaughter on the ground of diminished responsibility will often be preferable from the prisoner's point of view, to one of guilty but insane, when the result may be that the prisoner may be detained in Broadmoor for life. The latter result may well be in the public interest, and therefore, it is submitted, it is right that the Crown should be allowed to seek to achieve it."

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[8] [1958] 1 Q.B. 1; [1957] 3 W.L.R. 330.

[9] [1958] 1 W.L.R. 413; 42 Cr.App.R. 75.

In *R.* v. *Nott* [11] there arose the curious situation of the converse of *R.* v. *Bastian* (*supra*). Here the defence set up the plea of insanity and the prosecution sought leave, unopposed by the defence, to call rebutting evidence tending to establish that the accused was suffering from diminished responsibility, and leave was given.

What are the arguments for saying that the prosecution may not give evidence of insanity?

1. Insanity is a defence, and the prosecution cannot call evidence tending to establish a defence. It is absurd for the prosecution to contend for an acquittal. The duty of the prosecution is to ask for a conviction in so far as the evidence warrants it, consistent with its duty to the court.

2. If the prosecution has evidence of insanity it is the duty of the prosecution to make available such evidence to the defence, so that the defence may use such evidence if it wishes to do so.

3. It is very prejudicial to the defence to allow the prosecution to call evidence of insanity since the accused cannot appeal from a verdict of guilty but insane, as this special verdict is regarded technically as an acquittal: *Felstead*.[12] The accused's chances of an absolute acquittal, not guilty, as opposed to a qualified acquittal,

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[10] [1958] Crim.L.R. 392.
[11] (1959) 43 Cr.App.R. 8; [1959] Crim.L.R. 365.
[12] [1914] A.C. 534; 10 Cr.App.R. 129.

guilty but insane, are necessarily diminished, in cases of automatism, cerebral tumours, arteriosclerosis and similar defences where the prosecution is allowed to call evidence of insanity.

4. The M'Naghten Rules are a defence. The answer given by the judges to the second and third questions says: " . . . and that to establish a defence on the ground of insanity, it must be clearly proved . . .": *M'Naghten's Case.*[13] Similarly, section 2 (2) of the Homicide Act, 1957, says it shall be for the defence to establish diminished responsibility.

5. The cases of *Oliver Smith* (*supra*) and *Casey* (*supra*) are authority for saying that the prosecution may not call evidence of insanity and are commonly cited for this purpose.

6. With regard to the burden of proof, there are difficulties. What authority is there in the M'Naghten Rules or in section 2 of the Homicide Act, 1957, for saying that the prosecution must establish insanity or diminished responsibility respectively either beyond reasonable doubt or upon the balance of probabilities?

7. If the prosecution is not allowed to establish insanity and the accused gets an absolute acquittal it does not mean that a dangerous person is let loose again in society. There is adequate machinery provided by the Mental Health Act, 1959, for the compulsory detention of those suffering from mental disorder, and it is better for such persons to be detained under this machinery, with the right of appeal to the Mental Health Review Tribunal, rather than to be detained indefinitely as a Broadmoor patient with no right of appeal to the tribunal.

8. The Report of the Royal Commission on Capital Punishment[14] suggested that it would be damaging to the accused if he was attempting to set up a defence such as provocation if the prosecution called evidence pointing to insanity as this would be likely to discredit the accused's evidence.[15] Furthermore the Report suggested that it would place difficulties in the way of the prosecution if it could call evidence of insanity since it would not be right to call evidence of insanity in every case and it would place the prosecution in an invidious and embarrassing position in deciding whether or not to bring the issue of insanity to the attention of the jury.[16]

What are the arguments for saying that the prosecution should be entitled to give evidence of insanity?

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[13] (1843) 10 Cl. & Fin. 200, 207.
[14] 1953, Cmnd. 8932.
[15] Cmnd. 8932, § 448.
[16] Cmnd. 8932, § 454.

1. The duty of the prosecution is to assist the court in establishing the true facts. It cannot ask the court for a conviction knowing that the accused is not, or may not be, criminally liable, or is, or may be, entitled to a qualified acquittal. It must be the duty of the prosecution to resist a defence plea of not guilty when the prosecution have evidence suggesting that the accused may not be entitled to such a verdict in view of his insanity. Furthermore, the finding of guilty but insane is only a qualified acquittal and has some features of a criminal sanction, carrying as it does indefinite detention in a Broadmoor institution.

2. So far as the public interest goes, there is some possibility of a time lapse between the accused obtaining an absolute acquittal and the making of a compulsory detention order, if this should be appropriate, and this period of freedom for the accused might be dangerous to the public. Furthermore, there might be a strong feeling of injustice that an accused person, having been acquitted by the jury, should be promptly compulsorily detained by an order made by two doctors.

3. It may often be preferable for an accused who is in fact suffering from insanity to plead diminished responsibility, since the penalty for a finding of manslaughter may be anything from an absolute discharge to life imprisonment, whereas a finding of guilty but insane necessarily results in indefinite confinement in a Broadmoor institution. It is unrealistic and not in the public interest to permit an accused to palliate the legal consequences of his condition in this way.

4. The Trial of Lunatics Act, 1883, s. 2 (1), says: "Where in any indictment or information any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane, . . ." without indicating by whom such evidence shall be called. The M'Naghten Rules and section 2 (2) of the Homicide Act, 1957, merely say that if the defence wish to rely upon insanity or diminished responsibility then it is for the defence to establish such defence, and upon the balance of probabilities. This does not preclude the prosecution from alleging that one or other of these conditions existed at the time of the offence, and the burden of proof in accordance with the normal rule will be beyond reasonable doubt. In the M'Naghten Rules it says that insanity "must be clearly proved" without indicating by whom. In *Kemp* (*supra*) the prosecution called evidence of insanity when the defence did not raise this defence, at any rate specifically. *Bastian* (*supra*) and *Nott* (*supra*) support the proposition that the prosecution can challenge a defence of diminished responsibility with evidence of

insanity, and vice versa. *Oliver Smith* (*supra*) and *Casey* (*supra*) merely lay down the proper procedure to be followed when the defence raises insanity.

5. Where the prosecution have evidence suggesting that the accused is suffering from insanity when he is arraigned the prosecution must allege that the accused is unfit to plead. In *R.* v. *Beynon* [17] the problem was whether the preliminary issue of fitness to plead could be postponed until the general issue had been tried. Byrne J. held that the preliminary issue must be tried first. He said: " . . . if the court is aware of the fact that there is a preliminary issue whether the person who is charged before the court on an indictment is insane so that he is unfit to be tried, it is the duty of the court to see that that issue is tried, even though no application is made by the prosecution or by the defence." In *R.* v. *Dashwood* [18] Humphreys J. said: "It is a cardinal principle of our law that no man can be tried for a crime unless he is in a mental condition to defend himself . . . the court acts in such a case on information conveyed to it from any quarter. It does not matter whether the information comes to the court from the defendant himself or his advisers or the prosecution or an independent person, such as for instance, the medical officer of the prison where the defendant has been confined." From this it can be argued that the prosecution must assist the court in carrying out this duty by bringing to the attention of the court any evidence tending to establish insanity at the time of arraignment; and this is believed to be the practice. If the prosecution must contend that the accused is unfit to be tried because of insanity at arraignment when it has evidence available tending to establish this, then surely there is the same duty to the court to contend that the accused was insane at the time of the act when similarly it has evidence available tending to establish this. If the court cannot allow an insane man to be tried, surely it cannot allow an insane man to be convicted of a crime when he was insane at the time of the act.

6. The Report of the Royal Commission on Capital Punishment (*supra*) suggested that where the accused pleads guilty the judge, but not the prosecution, should be entitled to invite the jury to consider the issue of insanity, and that where the accused pleads not guilty the judge, but not the prosecution, should have the power to raise the issue of insanity if he has reason to believe the accused might have been insane at the time of the act and it is in the interests of justice and no reasonable or legitimate interest of the

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[17] [1957] 2 Q.B. 111.

[18] [1943] K.B. 1, 4; [1942] 2 All E.R. 586.

defence would be thereby prejudiced.[19] Dr. Glanville Williams[20] says: "Truth should not be shut out merely because it is detrimental to the accused person, if it is neither irrelevant nor unduly misleading." Then he suggests that if the prosecution were to have the power to call evidence of insanity the court should have a discretion in the penalty, since indefinite detention in a Broadmoor institution might not be always appropriate.

It is submitted in conclusion that it may well be that the authorities do not upon their proper construction preclude the prosecution from raising the issue of insanity where such issue is not raised by the defence, indeed it may be that the prosecution are under a duty to raise the issue; and that there is no compelling reason in the interests of justice why it should not do so.

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[19] Cmnd. 8932, § 454.

[20] *The Criminal Law, General Part*, pp. 310–314.

Mr. Sutterthwick's Court

By A. E. Jones, *Magistrate's Clerk*

Two "suspects"

It was not often that Frell could feel that he was really holding his audience when he addressed the dock in statutory terms; expressions ranging from mild puzzlement to complete apathy were the usual facial reactions to his words. It was gratifying, then, to observe Thomas Holfess hanging on to the announcement of the charge as if determined not to miss one syllable of its significance. Gratification vanished when the accused's attitude of strained attention persisted even after "Do you plead guilty or not guilty?" had been reached.

"He's a little hard of hearing," explained Mure, the assistant gaoler, with that absence of exaggeration which is automatic in a well-trained policeman.

Frell repeated the charge with his full lung power, but still it appeared that Holfess had not heard a word.

"You'd better have a try, Mure," said the clerk.

The assistant gaoler did not have to ask for the charge sheet; he had heard the formula in question so frequently that it was firmly imprinted in his mind. He stepped into the dock and projected into the defendant's right ear, at a range of six inches, the words "You are charged with being a suspected person loitering in High Street with intent to steal."

"There's no need to shout. I can hear all right without that," protested Holfess, flinching visibly.

"Do you plead guilty or not guilty?" continued Mure, lowering his voice by a few decibels.

"Not guilty, of course. I've never stolen in my life. I'm not a thief," was the reply.

"You'd better go down beside him and give your evidence there after you've taken the oath," said Mr. Sutterthwick to the plain-clothes policeman who had come into the witness-box during these preliminaries.

Evidence for the prosecution

The officer had had opportunity, since the arrest the previous day, to gauge the extent of the defendant's deafness; and, from the position suggested by the magistrate, he was able to make his evidence audible to Holfess without straining his voice unduly. The story he told was one which, in its essential details, was all too often heard in the court. He had seen the defendant loitering in High Street and looking down at shopping bags carried by women. In consequence, the officer—and a colleague who was on duty with him—decided to keep close observation on Holfess's movements. They did so for a period of twenty-seven minutes; during this time they saw him join four different bus queues and two groups of shoppers clustered round shop windows. His only interest, throughout, appeared to be shopping receptacles carried by women; he left the bus queues as soon as a bus came along, and he never, himself, examined any window display. Each time he joined a group, he stationed himself behind a woman who was carrying a shopping bag or basket, and, on three separate occasions, his hand was seen to go forward in the direction of the bag or basket—which, in each case, contained a purse lying on top of purchases. Movements by the women in question caused the defendant to lose his position in relation to their burdens, and he was not seen actually to touch anything—although once his hand went over one of the purses. When finally arrested, the defendant said "It's a dead liberty"; to the formal charge he replied "The officers have made a big mistake." He had £5 9s. 6½d. on him.

Invited to question the witness, Holfess embarked on the mixture of assertions, contradictions, arguments and comments which the layman commonly presented to the court as cross-examination. Basically it was a series of variations on one simple theme: that he had not done what was alleged, or anything like it, and the officer must either have made it all up or else have been watching some other person. The close proximity of the witness to the prisoner tended to make the elaboration of this thesis gradually assume the character of a private conversation between them. In the end it was Mr. Sutterthwick, and not the defendant, who was unable to hear what was said. "I didn't catch that last answer of yours, officer. What was it?" he had to ask.

"I was just asking him, your worship, whether he was asking me a question or making a statement" replied the officer solemnly, in a raised voice.

The defendant at length felt satisfied that he had demolished the constable's evidence; he announced that he had no more questions to ask. The whole process was then gone through again with the second plain-clothes policeman, who corroborated his brother officer's testimony almost word for word, and was subjected afterwards to the same verbal barrage from Holfess.

Evidence for the defence

That concluded the case for the prosecution. Without waiting for any explanation of his rights, Holfess proclaimed his desire to go into the witness-box. His evidence on oath was in very similar terms to his "cross-examination"; it amounted to an emphatic assertion that he was walking through High Street, not noticing any women or their shopping receptacles, and not stopping for anything, when he was suddenly pounced on by the officers and falsely accused.

He returned to the dock to be asked the routine final question: "Have you any witnesses?" His reply, after this had been interpreted by Mure, was "Well, there were a lot of people in the street and some of them must have seen that I was doing nothing wrong, so, perhaps, if an advertisement was put in the paper, they would come forward." The suggestion did not commend itself to Mr. Sutterthwick.

Verdict and judgment

Having verified that there were no witnesses for the defence actually present, he gave his judgment. It was a short and simple one: he accepted the evidence of the officers and convicted the defendant. He added "I regard this as a particularly mean and despicable kind of offence. These were ordinary shoppers you were trying to steal from. It might have meant serious hardship to some poor housewife if she had been robbed of the purse containing her week's money."

Inspector Campting got up with the customary folder in his hand, and said "The prisoner is a single man, your worship, and has five previous convictions, but none for this class of offence. . . ."

"What were they for?" inquired the magistrate.

"Indecently assaulting women, and common assault, your worship."

"Were the common assaults on women also?"

The Inspector consulted the folder and replied "Yes, your worship."

"Nothing for any other type of offence?"

Inspector Campting, after studying his folder again, said apologetically, "I beg your pardon, your worship, I see that there was one for indecent exposure."

Mr. Sutterthwick was silent for a moment or two and then said: " I can understand the police not proving these convictions in evidence against the defendant—as they would have been entitled to on this charge. They undoubtedly considered that, since they did not involve dishonesty, they would not help me much in deciding the case and would only introduce unnecessary prejudice against this man. But, it seems to me that they may, in fact, have an important bearing on the case. . . . I'd like the first witness back."

The constable returned to the dockside and the magistrate said to him " I take it that you didn't know of these previous convictions when you arrested the defendant? "

" No, your worship."

" If you had known of them and realised his apparent predilection for indecent behaviour towards women, might it have caused you to take a different view of the significance of his movements in relation to the women in this case? "

The officer pondered this question for some moments and then said cautiously " It might have, your worship."

" Thank you. That's very fair," observed Mr. Sutterthwick. Addressing the defendant, he said " I don't believe one word of the evidence you gave; but, now that I've heard what your character is, I feel it's possible that your actions were those of a sexual pervert and not a thief. If you were loitering with the intention of committing an indecent assault, that would not be the offence under the Vagrancy Act of loitering with intent to commit a felony, because indecent assault is a misdemeanour and not a felony. I'm convinced that your behaviour was thoroughly discreditable but, nevertheless, I must give you the benefit of any doubt that exists on this charge. So, although I said just now that I convicted you, I have changed my mind and decided to dismiss the case against you. You may go, and count yourself a fortunate man."

" Thank you very much, sir," said Holfess promptly.

" His hearing seems to have been miraculously restored." remarked the magistrate; but the defendant did not appear to hear this.

Remand case

The assistant gaoler, leaving Holfess to make his own way to freedom, went through the door marked " Prisoners " and returned with a nice looking, well dressed young woman whom he announced as " Remand Number One, your worship, Anne Peachey."

Mr. Sutterthwick glanced at his register and murmured to Frell "Well, at least, I shan't have to watch out for the same possibility in this suspected person as there was in the last one."

Mr. Bantingham stood up in counsel's seat and said "I appear for the defence this week, sir."

"Last week, sir, you heard the evidence of a detective constable and then the defendant asked for a remand in order to be legally represented," Frell reminded the magistrate.

"I should like that witness recalled for cross-examination, sir," said Mr. Bantingham.

A detective sergeant came into the witness-box and said "Unfortunately, your worship, that officer was called to give evidence in a case at sessions this morning, but he's on the way back to this court now . . . . I am a witness in this case, your worship."

"Then we'll hear your evidence now, and the other officer can be recalled later," said the magistrate.

The detective sergeant took the oath and proceeded to give an account of forty minutes observation on Anne Peachey which was almost a repetition of the evidence in the previous case, except that the alleged incidents took place at counters in a crowded departmental store, instead of in the street. There was the same account of going behind women with shopping bags, of reaching out a hand towards purses lying on top of purchases, and of frustrations due to the movements of the women concerned. When arrested, the defendant said, according to the witness, "You can't do this to me. You'll lose your job over this." She made no reply when formally charged and cautioned.

Mr. Bantingham rose to his feet and said "Before I cross-examine this witness, sir, I should just like to say this. The defendant is charged with loitering "in a place of public resort," namely, this departmental store. I know that this court has had other similar cases from this particular store; and I am aware that convictions have been recorded in a number of them. I have not, myself, been professionally engaged in any of those cases, but I have always considered it extremely doubtful whether this store is a place of public resort within the meaning of the Act. After all, what is it, in essence, but a shop? It only differs from the ordinary linen-draper's by its size—a difference of degree and not of kind. But, surely, it cannot be said that every little shop is a place of public resort, just because any member of the public may enter it to transact business. If that is the case, then this particular provision of the Vagrancy Act has, I venture to submit, a far wider ambit than was ever contemplated by its framers."

"That applies to a lot of Acts of Parliament, Mr. Bantingham," remarked the magistrate.

"True, sir. But, in construing a statute which creates a criminal offence, one should not stretch the law *against* the defendant," replied counsel, and continued immediately "However, I realise that it would be difficult for you, sir, after having convicted in a number of similar cases, to accept a submission from me, now, that you have been wrong in holding this store to be a place of public resort."

"I deal with each case on its own facts and arguments, Mr. Bantingham. In this case I've heard evidence that a number of members of the public were, in fact, resorting to this place. But I should listen to any submission from you with—I hope—an open mind; and certainly with the attention and interest which your arguments always command."

"Thank you, sir. But, in fact, my client does not wish to evade this charge on a technicality. She is confident of her ability to convince you of her innocence; and she would not be satisfied with anything short of an acquittal on the merits of the case. I merely felt it only right and proper, sir, to let you know that, if she were found guilty on the facts, I should advise her to ask you to state a case on the point of law I have just mentioned."

"If this is an attempt to intimidate me, it won't succeed," said Mr. Sutterthwick coldly. "Please proceed with your cross-examination, Mr. Bantingham."

"I should not be so foolish as to try to intimidate you, sir; and certainly nothing was further from my mind. I hope you know me better than that, with respect, protested counsel.

Mr. Sutterthwick said nothing, and Mr. Bantingham was obliged to turn his attention to the witness. Here he had much more success. He was able to secure admissions from the detective sergeant that there was a great deal of jostling going on in the store because it was sale time; that, almost inevitably, any woman in the store would find herself behind other women with shopping bags, in the natural course of events; and that any such woman might have to make movements with her arms to ward off other people who were pushing, or else to try to reach something on a counter through the press. Counsel concluded his cross-examination by saying, very impressively, "Now, sergeant, I want you to consider this question very carefully, and answer it perfectly fairly—as I know you will. You and I both heard the evidence in the last case and saw that, although it looked a cast-iron case, it did not, in the end, warrant a conviction. Bearing in mind the possibility of errors and misinterpretations in this kind of case, reviewing dispassionately the events in this store which led up to this young lady's arrest, and considering what you know about her now, are you prepared to say at this moment that you are absolutely sure in your own mind that she was intending to steal that afternoon? Think carefully, officer." The sergeant appeared to do so, and said, after a pause, " Well, I can't be absolutely sure of that, sir, of course."

" Thank you, sergeant," said Mr. Bantingham, looking triumphantly towards the magistrate.

" Well, after that admission, I can't be sure either," said Mr. Sutterthwick. " The other officer's evidence covered exactly the same incidents as the sergeant's, so it doesn't get over the effect of that last answer. . . . The case is dismissed."

" Thank you, sir," said Mr. Bantingham.

" That concludes the business of the court this morning, your worship," announced Sergeant Quing, the warrant officer.

As the magistrate and clerk walked along the passage that led to their rooms, Mr. Sutterthwick turned to Frell and said " I find these suspected person cases very difficult. They want such careful watching. . . . I must say that, until the sergeant made that admission, I thought I might have to find that woman guilty. And this sort of thing is so prevalent at the moment that prison would have been pretty well inevitable if she had been convicted."

" It would have been very unfortunate for the police if she had gone inside just now," said the clerk, who frequently knew things about cases which the magistrate could not be told before the hearing.

Mr. Sutterthwick raised his eyebrows, and Frell explained: " Unknown to the officers who arrested her, she has been providing the police for some time with very valuable information about the movements of a gang of safe breakers she used to be associated with. It would have spoiled everything if the police had lost their source of information at this particular moment, because they have reason to believe that a big job is being planned."

" I see," said Mr. Sutterthwick, looking very thoughtful.

An Australian Letter

By Professor Norval Morris

Developments in the Law of Homicide

With the collaboration of homicidal criminals and diligent defence counsel, the Australian courts have recently formulated a new line of defence to a charge of murder, the effect of which, like provocation, is to reduce the offence to that of manslaughter. Authority for this defence is to be found scattered through English cases but nowhere is it brought into clear focus. In articulating this defence, which is of both theoretical importance and likely to be frequently invoked once its potentialities are understood, the Australian courts have made an important contribution to British criminal jurisprudence. This Australian Letter will, therefore, be confined to a discussion of the problem faced and the decisions reached in the recent Australian cases of *McKay*,[1] *Howe*,[2] *Bufalo*,[3] and *Haley*.[4] The principle enunciated in these cases does not appear to have attracted the attention of the textbook writers, nor has it been the subject of consideration by any appellate court in England.

The right to self-defence

Defined rights to protect himself by the use of force are accorded to one whose life or bodily safety is illegally threatened; likewise, force may lawfully be used to prevent the commission of a violent or atrocious crime and probably of any felony, to arrest the felon, to protect the bodily safety of third persons, and to protect property. All these various rights are classified and described with some precision in the extensive case law of the common law of crime; but the criminal liability of one who exceeds the limits of justification or excuse and in doing so kills has until recently been largely ignored. Is he a murderer? Or is he guilty of only manslaughter? The answer to these questions is—on the Australian authority—that " if the occasion warrants action in self-defence or for the prevention of felony or the apprehension of the felon but the person taking action acts beyond the necessity of the occasion and kills the offender the crime is manslaughter—not murder." [5]

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[1] [1957] V.R. 560.

[2] (1958) S.A.S.R. 95; 32 A.L.J.R. 213.

[3] [1958] V.R. 363.

[4] 1959 W.N. (N.S.W.) 550.

McKay's case

The facts in *McKay* and *Howe* illustrate how these problems arise. McKay worked on his father's poultry farm. For some time there had been persistent thefts of poultry from the farm, evidence being given that in the preceding three years one thousand chickens had been stolen. McKay had diligently tried to prevent these thefts and once had captured a chicken thief who, upon trial, was convicted and fined £10. Early one morning McKay was, in his own view, fortunate enough to discover a thief on the premises. McKay got his rifle, sneaked up on the thief, rested the rifle on the top strand of a wire fence, and fired five times, killing the thief. McKay told the police that he intended only to wound the intruder and offered the legally fascinating proposition that "I consider I am entitled to wound a man who was stealing fowls on my property, especially when we have notices up 'Trespassers Prosecuted'."

The case was tried before Mr. Justice Barry of the Victorian Supreme Court, who directed the jury that excessive force used in protecting property, or preventing a felony, or arresting a felon, or a combination of these rights, should lead to a conviction of manslaughter and not murder. His direction was accepted on appeal by the Victorian Court of Criminal Appeal and special leave to appeal was subsequently refused by the High Court.

Howe's case

Whereas McKay overacted the role of captor, Howe, also on his own version of the event, overacted that of self-defender. Howe killed one Millard, who, according to Howe, had made a homosexual attack on him. Howe said that he had pulled himself free from such an attack when they were standing in front of Howe's car, which was parked in a secluded spot, and that he then ran back to the car and upon opening the door saw protruding from under the front seat the butt of a loaded rifle which he had put there but had forgotten. He took the rifle and shot Millard, who was then standing about eight or nine yards away with his back to Howe. Howe gave evidence that he believed that the attack on him had been of a sodomitical character, that Millard was somewhat stronger than himself and that he doubted that he could keep him off with his hands, and that he fired intending to stop further attacks and not thinking at all whether he was likely to kill Millard.

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[5] *Per* Lowe J. in *McKay* [1957] V.R. 560 at 561.

He said that it did not occur to him to get into the car and drive off. The trial judge, Mr. Justice Ross of the South Australian Supreme Court, directed the jury that upon this evidence they could find manslaughter instead of murder on the ground of provocation but he gave no other direction about manslaughter. On the issue of self-defence, apart from provocation, he told the jury that if the force used was excessive then the evidence afforded no defence at all. On appeal from a conviction of murder, the High Court of Australia and the South Australian Court of Criminal Appeal were of the view that it was the trial judge's duty to direct the jury that if they believed Howe's story, but regarded the defensive force he had used as excessive, they should convict him of manslaughter.

The subsequent decisions of *Bufalo* and *Haley*, referred to above, accept the principle of law enunciated in *McKay* and *Howe* and deal with some of its procedural aspects.

Authority for this "new" qualified defence

The fact that juries are free to bring in compromise verdicts of manslaughter in murder charges has perhaps concealed the development of this qualified defence. When, however, the English authority on it is marshalled, it is surprising to find such a wealth of supporting case law without the principle emerging from it being clearly perceived. English authority on the matter dates from 1640, but it is not until one crosses the seas to Canada, to the United States, and now to Australia that the implications of this case law receive consideration and this line of defence to a charge of murder is articulated. The extensive English authority is fully discussed in the four Australian cases to which reference has been made and also in an article in the recently established *Adelaide Law Review*.[6] For purposes of this letter all that space will allow is to give reference to the main English cases and to affirm that they make up a line of authority which can only be explained on the basis that many English courts, though eschewing any enunciation of doctrine, have applied the rule that excessive and lethal force used in self-defence or defence of property or to arrest a felon should lead to a conviction of manslaughter and not murder.[7]

The only difficulty, as a matter of precedent, which the

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[6] 1960, vol. I, No. 1.

[7] *Cook* (1640) Cro.Car. 537; 79 E.R. 1063; *Scully* (1824) 1 Car. & P. 319; 171 E.R. 1213; *Bull* (1839) 9 Car. & P. 22; 173 E.R. 723; *Whalley* (1835) 7 Car. & P. 245; 173 E.R. 108; *Patience* (1837) 8 Car. & P. 775; 173 E.R. 338; *Odgers* (1843) 2 M. & Rob. 479; 174 E.R. 355; *Weston* (1879) 14 Cox C.C. 346; *Symondson* (1896) 60 J.P. 645; *Biggin* [1920] 1 K.B. 213. There is also adequate Canadian and American authority: see the *Adelaide Law Review* (1960) vol. I, No. 1.

Australian courts had to face was the decision of the House of Lords in *Mancini*.[8] It will be recalled that Mancini was convicted of the murder of Distleman, his story being that Distleman and Fletcher had attacked him, Distleman having a penknife in his hand, and that he had used his two-edged dagger-type knife in self-defence. Mancini's appeal to the House of Lords was based on the failure by the trial judge to direct the jury on manslaughter. The Lords unanimously dismissed the appeal. Having rehearsed the facts of the killing, the Lord Chancellor said:

> "The main case set up on behalf of the appellant at the trial was self-defence, and the learned judge devoted the first portion of a very careful summing-up to this question. The appellant's counsel found no fault with this part of the judge's charge at all. . . . The learned judge was content that the jury should deal with the question of self-defence on the basis that, if they believed the appellant's story at the trial about Distleman advancing with the open penknife in his hand, they should return a verdict of 'not guilty.' The jury's verdict shows that they disbelieved the appellant's story. Self-defence by the use of so deadly a weapon could not be made out if the appellant was never threatened with the penknife. . . ." [9]

The appeal in *Mancini* concentrated on the question of provocation and its relationship with the rule in *Woolmington* v. *D. P. P.*[10] mention also being made by Viscount Simon L.C. of chance-medley. What was not mentioned at Mancini's trial, nor in the Court of Criminal Appeal, nor in the House of Lords, was the possibility of a verdict of manslaughter on the plea of self-defence. This raises a substantial question of precedent—does the decision in *Mancini* involve a rejection by the House of Lords of a verdict of manslaughter where excessive and lethal defensive force has been used? This question was squarely faced in the Australian cases discussed in this letter, Mr. Justice Menzies of the High Court dealing with it as follows:

> "The trial judge [in *Mancini*] did not direct the jury that the use of excessive force in the course of self-defence would warrant or require a verdict of manslaughter and it is now said that the fact that this was not treated as an omission shows that such a direction was not necessary. I cannot accept this contention. The judgment of the Lord Chancellor was based upon the assumption that the jury rejected the prisoner's story

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[8] [1935] A.C. 462.

[9] [1942] A.C. 1, at 6–7.

[10] [1935] A.C. 462.

> that he was attacked with a knife and that this rejection left nothing beyond the possibility of an attack with hand or fist. It was not argued for the prisoner that he killed with his knife in defending himself against such an attack; what was argued and what was rejected was that such an attack could amount to provocation for the killing. It would, I think, be quite unsafe to regard *Mancini's* case in the way for which the Crown contended. The House of Lords was not dealing in any way with the problem that arises here."

Of course, if the facts in *Mancini* recurred and if the rule enunciated in *Howe* and *McKay* is good law, the defence counsel would doubtless argue that even if the accused was not justified on the grounds of self-defence (because he used a knife when the jury believed his assailants were not armed at all) and even if the accused's crime could not be reduced to manslaughter on the grounds of provocation (because the means he used were disproportionate to the provocation) yet he should be convicted only of manslaughter because he honestly and reasonably believed he was defending himself, even though he used disproportionate means in doing so. Surely, in *Mancini* the jury might have disbelieved Mancini's story that Distleman was armed with a penknife and yet believed Mancini when he said he thought he was being attacked and was in grave personal danger from Distleman and Fletcher. If so, then if the Australian cases are correctly decided, the jury in *Mancini* should have been directed to determine whether Mancini honestly and reasonably believed himself to be the subject of an attack which might seriously injure him, and, if that was his belief, to direct them to bring in a verdict of manslaughter. This line of defence was not, however, brought to the attention of the House of Lords in *Mancini* and had it been argued the case might have been differently decided; the failure of the Law Lords to advert to what was not argued before them cannot be used as binding authority for the non-existence of this line of defence.

Limits of this "new" defence

It is necessary to distinguish cases in which the accused should have the benefit of this "new" qualified defence from cases where the killing was so divorced from the supposed defensive situation as to be entirely independent of it. At what point does this happen? What are the principles, what the formulae, which fix the point of operation of this qualified defence?

The operative principle was clearly stated by Hawkins (1 P.C. (8th ed.) 79): "There must be no malice coloured under pretence of necessity; for wherever a person who kills another acts in truth upon malice and takes occasion from the appearance of necessity to execute his own private revenge, he is guilty of murder." Such a principle is easy to state but its application will require gradual refinement in the case law. To distinguish between situations where a man is primarily defending himself or his property from those where he is merely lethally expressing his desire for revenge is not easy; temporal considerations are likely to be important in this discrimination and it will require the most careful distinction to be drawn between motive and intent. The essence of the matter is, in Mr. Justice Menzies' words, that any statement of the law on this qualified defence "would always leave open the question whether the person who killed was defending himself when he did so," [11] and this is inescapably a judgment which the jury must take based both on their view of the state of the accused's mind at the time of the killing and of the circumstances in which he was placed.

There are also doctrinal problems concerning the limits of this line of defence. The Australian cases have applied this rule that excessive and lethal force equals manslaughter to self-defence, the defence of others, and the defence of property. It applies also, it is submitted, to excessive and lethal force used in preventing crime or arresting criminals and there is considerable case law to support this.

Nor does this exhaust the list of "qualified defences" to a charge of murder. Provocation is, of course, such a qualified defence. It is the concession which the law properly makes to human frailty. The situations which the law regards as technically provocative are those in which, though the accused's lethal action is to be condemned as felonious, he yet acted under stress which might move an average man, placed as he was, to extreme rage. We mitigate guilt and punishment because of an appreciation of the weakness of human nature in situations where the threat of a conviction of murder seems unlikely to deter any more than the threat of a conviction of manslaughter, and because it would be contrary to the popular sense of justice to convict and punish for murder.

It is submitted that the same principles of mitigation of punishment are applicable to excessive and lethal force used under duress or necessity.

Under certain circumstances an accused has a defence of duress or coercion. There is authority that this defence does not apply to murder, but the possibility that in such cases the proper verdict is manslaughter and not murder has received little consideration. The recent Wisconsin Criminal Code has expresssly provided for this verdict in such cases and it is submitted that the law should mitigate the penalty when the accused was subject to the genuine coercive pressure which threatened his life or bodily security, or that of his family, when he killed. Although one who under duress takes the life of an innocent person is (as the law stands) not guiltless, he nevertheless does not manifest the same degree of homicidal wickedness as the murderer. The deterrent force of the law would not be weakened by such a result and a conviction of manslaughter better expresses the extent of guilt than does a conviction of murder. There is no case law supporting this result nor is there any opposing it. The reasoning in the cases we have considered does, however, lend support to the acceptance of this qualified defence of coercion or duress in murder cases.

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[11] (1958) 32 A.L.J.R. at 221.

Turning to the defence of necessity. The two main cases in Anglo-American law in which the defence of necessity has been considered in homicide cases are *U.S.* v. *Holmes*[12] and *Dudley and Stephens*.[13] In the former, it will be recalled, the charge was manslaughter and not murder. This charge can only be explained on the theory that the prosecution viewed Holmes' crime as of lesser guilt than the crime of murder and saw him in effect as having a qualified defence of necessity. Holmes was convicted, sentenced to six months' imprisonment, but even this relatively brief term was remitted shortly after sentence.

In *Dudley and Stephens* the charge and conviction were for murder. But the prisoners were reprieved and served only a term of six months' imprisonment. The relationship between the capital sentence and the clement penalty actually imposed reveals the gap in our legal analysis which should properly be filled by allowing a qualified defence of necessity in those exceptional homicides where it may be relevant. Again, though case law explicitly supporting this result is lacking, it is nowhere rejected by authority, and it accords both with principle and social utility.

It may indeed be desirable, as Lord Coleridge suggested in *Dudley and Stephens*, for the law "to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy"[14]; but it is hard to see a reason for declaring a failure to achieve these standards to be murder when a manslaughter conviction achieves the law's affirmation of social principles, preserves what marginal deterrents might be thought to reside in a criminal sanction for this type of conduct, and better accords with our view of the moral guilt of those who weaken under the most extreme temptation.

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[12] (1842) 26 Fed. cases, no. 15, 383.
[13] (1884) L.R. 14 Q.B.D. 273.
[14] (1884) L.R. 14 Q.B.D. at 288.

Onus and burden of proof

Since *Woolmington* and *Chan Kau* [15] it is clear that, if the accused raises a real issue as to whether the killing was justified or excused on the ground that he acted in reasonable self-defence, the onus and burden of proof rest on the prosecution to disprove this defence beyond reasonable doubt for a conviction of murder.

In *Bufalo*,[16] Mr. Justice Sholl of the Victorian Supreme Court, relying on these cases and on the decision in *McKay*, took the view that where the accused had raised a real issue of self-defence he should direct the jury not to convict of murder unless there was evidence upon which " the jury could make a positive finding that the accused was not acting in self-defence at all, or in other words that he caused the death by an act or acts not done for any genuine purpose of defending himself from injury but entirely for other purposes," and, this evidence being lacking, he accordingly withdrew the possibility of a murder conviction from the jury and directed them to determine whether the accused acted within the limits of the doctrine of self-defence so as to be entitled to an acquittal. When it is clear that the accused honestly saw himself as defending himself, no matter how wrong-headed his view of the facts, the issue is manslaughter or acquittal, not murder or manslaughter or acquittal.

It must be remembered that in applying these rules the accused is to be judged not on the facts as they were but on the facts as he reasonably believed them to be. There is extensive authority supporting this, of which *Rose* [17] is the leading case and in which the Australian decision in *Griffin* [18] deserves mention.

On whom, then, lies the onus and burden of proof of exceeding or not exceeding these limits? It is submitted that on general principles the answer is clear—once a real issue of self-defence has been raised on the evidence by the defence, the prosecution will will have to establish beyond reasonable doubt:

(a) for a conviction of murder, that the accused was not acting in self-defence at all, or

(b) for a conviction of manslaughter, that the accused, though acting in self-defence, exceeded the limits of self-defence as regards the means or force he used.

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[15] [1955] A.C. 206.

[16] [1958] V.R. 363.

[17] (1884) 15 Cox C.C. 540.

[18] (1871) 10 S.C.R. (N.S.W.) 91.

The social wisdom of this qualified defence

It has been suggested that this new qualified defence is a "Gangster's Charter"; that it lessens the deterrent force of the law of homicide at a time when it needs strengthening, not weakening by spurious defences; that it encourages fake defences which are difficult to disprove; and that it greatly complicates the task of the jury and of the trial judge. These amount to severe criticisms which cannot lightly be brushed aside. They involve, however, not the morality of this qualified defence but rather its applicability under our system of trial. Whenever self-defence as an absolute or qualified defence is pleaded (and, if the defence arises on the facts, even if not pleaded), the judge will have to direct the jury at both levels—on the absolute and on the qualified defence—as well as on any other defences which may have arisen in the trial. And to reject this qualified defence the jury will have to be satisfied beyond reasonable doubt that the accused did not reasonably think himself to be exercising any rights of self-defence, and that he was not merely using the occasion as a pretext for a planned killing.

As a moral issue it is clear that one who kills while abusing a legal right of self-defence but who, not unreasonably, sees himself as defending himself, is much less guilty than the killer lacking this excuse. The moral distinction between them is substantial and should properly be reflected in the crimes for which they are to be convicted.

Likewise, if our purposes are primarily deterrent, it is wise to reserve our major condemnation and punishment, our most deterrent sanction—the conviction and punishment for murder—for those killings which are planned by the accused and for which he cannot reasonably see any justification. If a jury convicts of manslaughter because of doubt as to whether the accused was or was not defending himself at all, it is unlikely that in jurisdictions preserving capital punishment the accused would be executed if he were convicted of murder. The punishment for manslaughter in most jurisdictions gives the judge the widest discretion in sentencing, including the power to impose protracted periods of imprisonment. Judges will have no difficulty in expressing by the form and severity of sentence their view of the gravity of the offence, whereas if the only choice is between murder and acquittal either excessive or no punishment will frequently occur.

It is not true to say that the doctrine of provocation and the jury's right to bring in a compromise verdict of manslaughter (even when not directed on manslaughter) together avoid any difficulties flowing from the absence of a qualified defence of self-defence. Again, we cannot base a just and effective system of criminal law on a foundation of reliance on the irrationality of juries, for there is no reason to doubt that, generally, juries do struggle to follow judicial directions on the law. And provocation, certainly as enunciated in *Mancini*, is frequently absent in the excessive self-defence situations; it was lacking in *McKay*.

Finally, it is a mistake to assume that the existence of such a qualified defence will always favour accused persons. It may have the contrary effect. It may well be less of a " Gangster's Charter " than a wise technique whereby wrongdoers, who would otherwise have been acquitted, are convicted of manslaughter, and thus may help to affirm in the criminal law that reverence for life which is the fundamental requirement of a civilised community.

Laboratory Investigation in Firearms Cases

(II)

THE MICROSCOPICAL EXAMINATION AND COMPARISON OF BULLETS AND CARTRIDGE CASES

By Detective Chief Inspector George Price, B.E.M., *Ballistics Section, Home Office Forensic Science Laboratory, Nottingham.*

The identification of a firearm used in the commission of a crime may only be possible by linking it with a bullet or cartridge case found at the scene of the crime. Since it is generally useless to attempt a direct comparison of the barrel or parts of a firearm with the bullet and cartridge case, it is necessary to carry out a microscopical comparison of the crime bullet and cartridge case with a test bullet and cartridge case fired in the suspect firearm.

Test bullets and cartridge cases

The test bullet and cartridge case needed for microscopical comparison purposes must be fired and recovered without any alteration of the surface markings produced on them by the firearm from which they are fired.

The method normally used in this laboratory is to fire the bullet into good quality cotton waste contained in a steel box the dimensions of which are ten inches by ten inches by forty inches long. The box has a hinged lid, the front end has been cut away and the rear end has been reinforced with a ¼″ steel plate. A thin card is placed in the cut-away front, and at approximately 9″ intervals in the cotton waste. This facilitates recovery of the bullet by indicating its track and the section of waste in which it finally comes to rest. The bullet is discharged into the box from a range of approximately three feet and is readily stopped at a comparatively short distance. A ·45″ bullet is generally stopped within the first 9″ of waste, and it can be recovered from the cotton waste in an undamaged condition. Cotton wool is sometimes employed instead of the cotton waste for the purpose of recovering soft lead bullets.

This box, containing loosely packed cotton waste or cotton wool is used to recover bullets fired from pistols, sub-machine guns and small bore rifles. In order to recover bullets fired from military and large bore rifles an additional box approximately two feet long containing cotton waste is placed in front of the standard recovery box.

Some workers fire into water for this purpose, although my experience is that high velocity bullets and some lead bullets suffer damage on impact with water.[1] This difficulty can be overcome by reducing the powder charge in the test cartridge which will result in a lower bullet velocity and a consequent less violent impact with the water. This practice cannot, however be recommended since the pressures set up within the chamber and the barrel are also reduced, and will, in some cases, have an adverse effect on the subsequent bullet and cartridge case markings.

Other methods of bullet recovery which have been tried with varying degrees of success include firing into oiled sawdust, granulated cork, china clay and heavy grease.

Cartridges used for such test purposes should, if possible, be of the same type and manufacture as the crime bullet and case. When cartridges are recovered from a suspect it is often possible to use some of these for test purposes.

Examination procedure

Before the actual microscopical comparison is started it is necessary to determine whether the crime bullet and case show agreement in make and model characteristics with the suspect weapon, *i.e.*, calibre, number of grooves and lands, direction of twist and pitch of rifling, shape of the ejector bar mark (if any), shape and position of extractor mark.[2] If there is general agreement of these features, then it is possible that the bullet and cartridge case were fired in a firearm of the same type as the suspect weapon. If there is a serious disagreement in any of these features, this may well indicate that the suspect weapon could not have been used in commission of the crime.

The microscopical examination is best carried out by means of a comparison microscope. This consists basically of two microscopes fitted with a common eyepiece, thus enabling objects mounted on each microscope to be examined simultaneously. Several variations of this microscope which have been made specially for bullet comparisons are available. The one in use in this laboratory is a " De Vere " bullet comparator. This instrument projects the magnified image of the objects being examined on to a screen, which greatly facilitates the examination and considerably reduces possible eye strain when a lengthy examination is involved.

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[1] See fig. 1.

[2] See [1960] Crim.L.R. p. 404.

Bullet examination

To the naked eye a newly manufactured barrel will usually appear perfectly smooth. However, the various processes through which the barrel goes during its manufacture give rise to the presence of innumerable minute irregularities on the interior surface of the barrel. In addition to these, a barrel may show imperfections due to wear and tear arising from repeated use, and to corrosion. Because these irregularities and imperfections in a barrel are accidental they can be regarded as being individually characteristic of the barrel.

The bullet of a cartridge which is designed to be fired in a particular firearm is slightly larger than the bore diameter of the barrel of that firearm. Because of this it would normally form a tight fit in the barrel through which it is fired, but in addition, when the bullet is fired, the burning propellent powder sets up extremely high pressure behind it, causing the bullet to expand tightly against the barrel walls. Thus its passage along the barrel will result not only in a reproduction of the rifling but also in the production of a series of scratches or striations on its surface caused by irregularities within the barrel.

These striations, which are present on test bullets fired from a firearm in good condition, will usually show a high degree of correspondence with each other when examined and compared microscopically.[3] There are exceptions to this, particularly where a firearm exhibits some serious defect of its barrel. In a recent examination I carried out, the barrel of the crime firearm, a ·32″ Colt pocket pistol, was badly bulged about one inch from the muzzle. It was established that as a result of this bulge there was a lack of consistency in the striations produced by the barrel on bullets fired consecutively, and it was therefore not possible to demonstrate a satisfactory degree of correspondence on the striations. As a result of this, it was impossible to link the firearm with the crime bullet, although the firearm was, in fact, linked with six cartridge cases found at the scene of the shooting.

If the test bullets show agreement with each other, and if, in fact, the suspect firearm was used in the commission of the crime, it is reasonable to expect agreement of the striations between a test bullet and the crime bullet.

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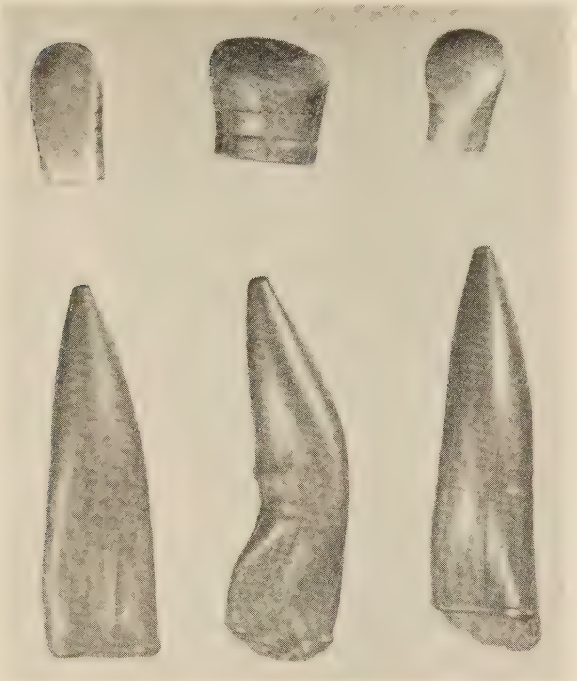
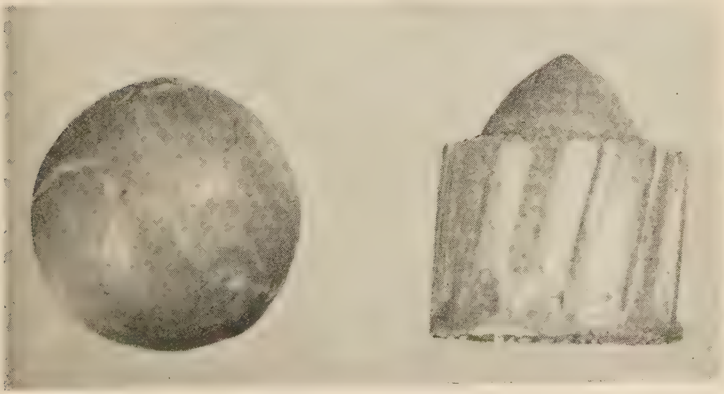
[3] See fig. 2.

Fig. 1

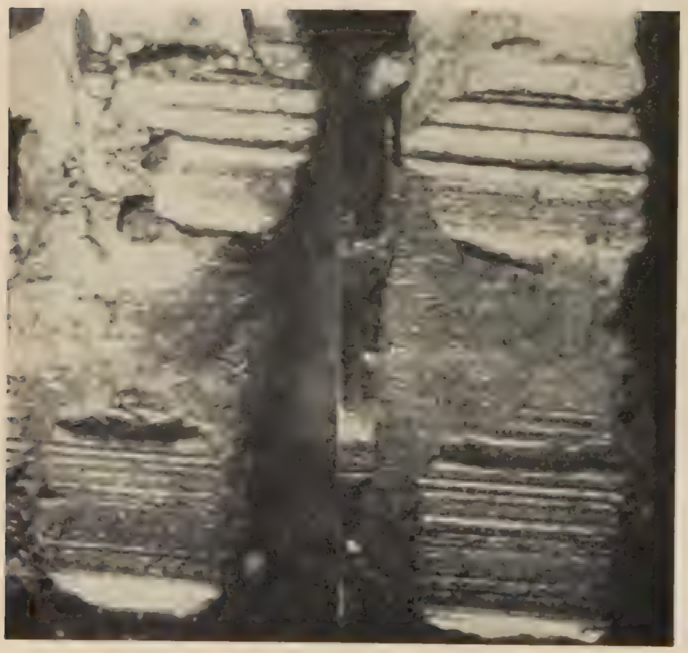


Bullets fired into water for recovery purposes, showing damage caused on impact.

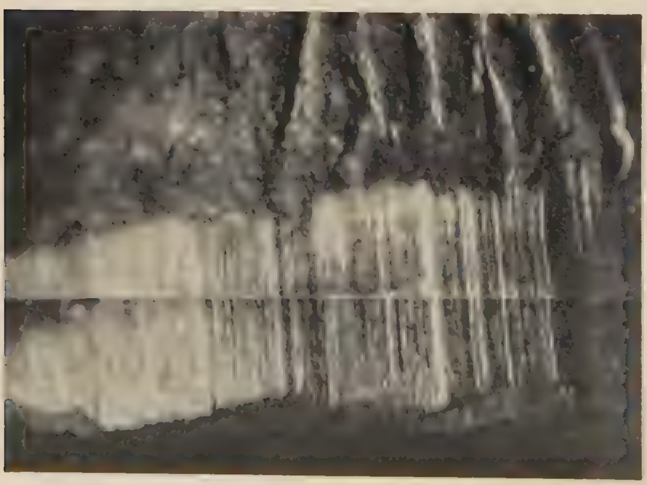


12 gauge and bullet.

Fig. 2

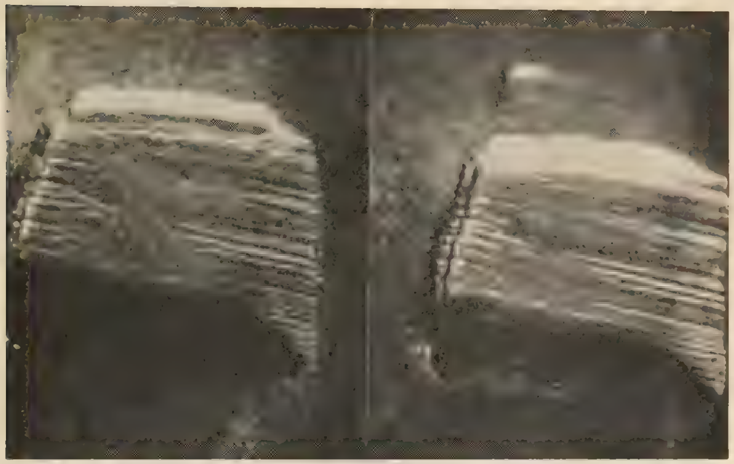


Comparison photomicrograph showing agreement of bore striations.

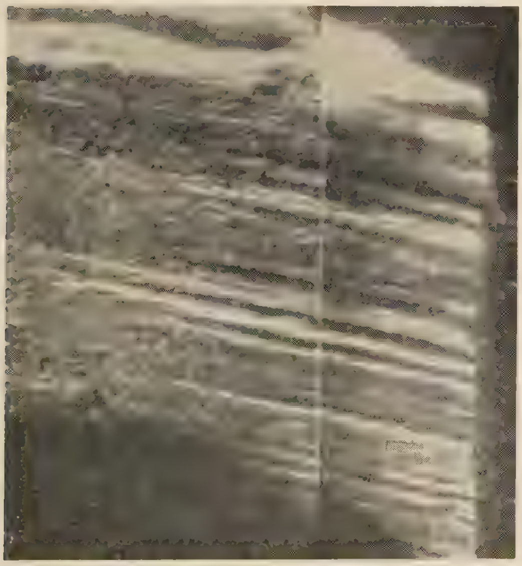


Comparison photomicrograph showing agreement of bore striations on air gun pellets.

Fig. 3

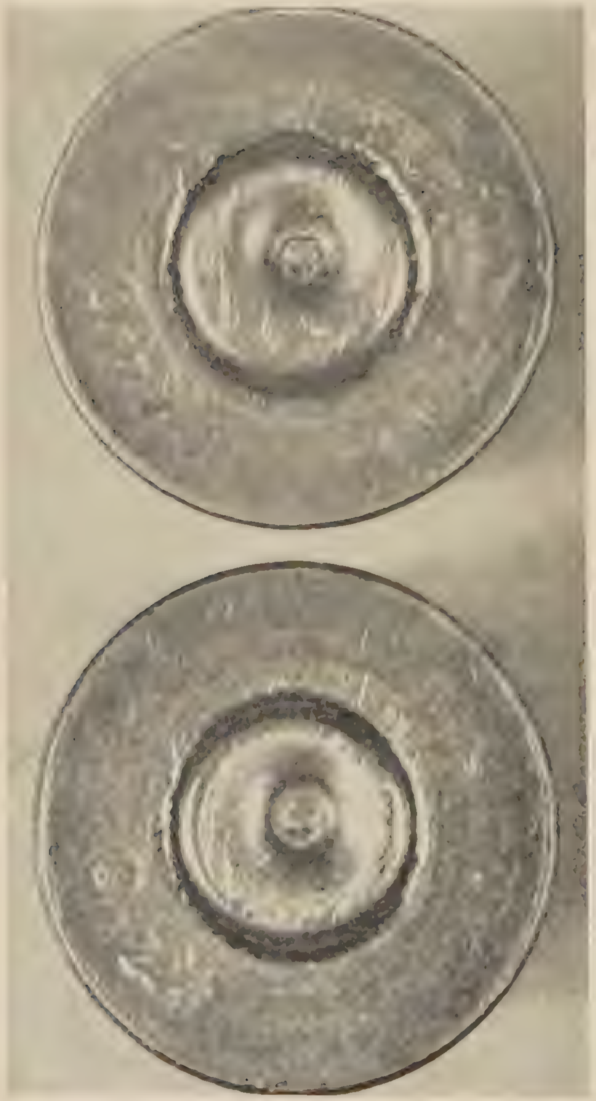


Firing pin marks on ·22″ rim fire cartridge cases.



Photomicrograph showing agreement of above firing pin marks.

Fig. 4



Showing agreement of breech block markings on cartridge cases

A detailed comparison of the entire surface of the bullets is made, and providing the crime bullet is not badly deformed an experienced investigator will readily establish whether or not agreement exists. Even in cases where the crime bullet is badly deformed it is sometimes possible to carry out a satisfactory comparison with a test bullet, and as a result either to eliminate the weapon or identify it with the crime.

Cartridge case examination

It is generally agreed that a cartridge case lends itself more readily to identification with an individual firearm than does a bullet. This is particularly so when the firearm in question is of the automatic or self-loading variety. The reason for this is that a cartridge case may bear characteristic markings caused by several distinctly different parts of a firearm mechanism.

The method of examination and comparison of cartridge cases is similar to that employed in the examination of bullets. A preliminary examination of make and model characteristics is made by means of a hand lens or low power binocular microscope. A general comparison of the individual characteristics can be made in the same way. The ultimate examination is made by means of a comparison microscope.

Markings on a cartridge case which may be highly characteristic of the weapon are caused by the firing pin, which, when it strikes the cartridge, leaves an indentation on the soft metal primer cap of the cartridge head.[4] Manufacturers' tool marks or imperfections caused by wear and tear and corrosion, may be present on the firing pin and will be imprinted within the indentation. Some firearms need to be broken open for the purpose of loading or unloading, *i.e.*, shot guns and some rifles, and if there is any tendency for the firing pin to stick in the forward position, this may result in the firing pin leaving a " drag " mark on the cartridge case when the breaking action takes place. This mark will also consist of striations arising from any irregularities on the firing pin.

Some firing pins are free to rotate and because of this the position and shape of a firing pin indentation may not be consistent in its relation to other markings on the case.

Irregularities due to wear and tear, corrosion and manufacturing processes are also quite often revealed on the breech block of a firearm. These may in turn be impressed on the head of a cartridge case due to its recoil on to the breech block when the gun is fired.[5]

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[4] See fig. 3.

[5] See fig. 4.

These irregularities of the breech block are essentially accidental and can be regarded as being individually characteristic of the firearm.

The process of extraction or ejection of the cartridge case from the chamber of the gun, after the cartridge has been fired, gives rise to a further series of characteristic markings of the case. With revolvers and shot guns the cartridge case is generally " pushed " from the chamber by means of the ejector mechanism which engages behind the rim of the case. In other firearms the cartridge case is often " pulled " from the chamber by an extractor, the claw of which grips the rim of the case. In automatic and self-loading weapons the cartridge case is extracted and then it strikes a projecting part of the mechanism known as the ejector bar.

When a cartridge is fired the case is expanded forcibly against the walls of the chamber and when the case is withdrawn from the chamber any irregularities present on the chamber walls will give rise to striations on the sides of the cartridge case.

Whatever method of extraction or ejection of a cartridge case is employed in a firearm, it will be seen that there is a distinct possibility of an entire series of marks being caused on the cartridge case, which, when examined and compared microscopically, may provide the means of either identifying or eliminating a suspect firearm.

A cartridge case will sometimes bear marks caused in the process of loading it into a magazine or chamber and it may then be possible to link an unfired cartridge with a particular firearm by reason of such markings, caused when the cartridge was loaded and then unloaded from the gun.

Smooth bore guns

Cartridge cases fired in smooth bore guns also lend themselves to microscopical examination and comparison, and may in this way be linked with a particular firearm.

One such examination carried out at this laboratory involved a 12 gauge cartridge case found at the scene of the shooting of a show horse. By means of a microscopical examination the cartridge case was identified as having been fired in the left barrel of one of fifty 12 gauge shot guns submitted in this connection.

For all practical purposes it is not possible to link individual pellets forming part of a shot cartridge load with the gun from which they have been fired. A small proportion only of the pellets of a shot cartridge come into contact with the barrel when the cartridge is fired and only a comparatively small area of these pellets actually bears on the surface of the bore. In addition, shot cartridge pellets are readily distorted on contact with a target.

Bulleted cartridges for use in smooth bore guns, although somewhat common in the U.S.A. and some continental countries are rarely encountered in this country. Such a bullet fired in a smooth bore will bear striations characteristic of the bore. Special ball cartridges for use in 12 gauge guns, some which are met with today, were manufactured during the early part of the last war for use by the " Local Defence Volunteers." Experiments have shown that it is sometimes possible to link such missiles with the bore through which they have been fired.

Smooth bore air-operated guns are sometimes employed in the commission of crime, and experience has shown that missiles fired from such guns often reveal striations enabling an identification of the gun to be made.

Value of laboratory examination

It will be appreciated, from the foregoing remarks, that every firearm possesses, in addition to make and model characteristics (referred to in the first article), its individual characteristics which are transferred in one form or another to a bullet and cartridge case fired in the weapon. The assessment of the value to either an investigating officer or to the court of bullet and cartridge case markings, may well be governed by the experience of the person undertaking the examination and the equipment at his disposal.

Practice and Procedure

Trial in open court

Power to exclude public

The Times of April 26, 1960, records a case in which, on the advice of their clerk, justices considered that they had no power to exclude from the court members of the public while two girls, aged twelve years, gave evidence of alleged indecent acts.

At common law all trials on indictment must be held in open court. Section 98 (4), Magistrates' Courts Act, 1952, makes a similar provision for summary trials. There are statutory exceptions to this general rule.

Every court has an inherent jurisdiction to exclude the public from a trial if it is necessary for the administration of justice and the instances mentioned in *Scott* v. *Scott* [1913] A.C. 417, are not exhaustive: *Ex p. Doyle* [1917] 2 K.B. 254. The public may be excluded where the court is of opinion that a witness is hindered, or prevented from giving evidence by the presence of the public: *Moosbrugger* v. *Moosbrugger* (1913) 29 T.L.R. 658; *Cleland* v. *Cleland* (1913) 109 L.T. 744.

In the case of children and young persons who are required to give evidence in cases of indecency the exclusion of the public is provided for by section 37, Children and Young Persons Act, 1933. With due respect to the clerk to the justices this provision does extend to cases under section 4, Vagrancy Act, 1824. [C. B. ORR.]

Case and Comment *

BREACH OF THE PEACE

Section 54 (13), *Metropolitan Police Act,* 1839—*behaviour must be of such a character that a breach of the peace might be occasioned*

Bryan v. Robinson

Queen's Bench Divisional Court: Lord Parker C.J., Ashworth and Salmon JJ.: [1960] 1 W.L.R. 506.[1]

A hostess at a non-alcoholic refreshment house stood in the doorway, leaned out, smiled, beckoned and spoke to three men who were walking in the street past the front of the premises. The men, being annoyed by the woman's conduct, walked across the street away from the premises. The woman was charged with using insulting behaviour whereby a breach of the peace might have been occasioned, contrary to section 54 (13) of the Metropolitan Police Act, 1839. The Chief Magistrate convicted the woman, and fined her 40s.

Held, allowing an appeal against conviction by case stated, that in order to constitute an offence under section 54 (13), there must be not only insulting behaviour but the behaviour must be of such a character that a breach of the peace might be occasioned and, in the circumstances, even if the woman's gestures were insulting, they were not such as might occasion a breach of the peace, and that she was not, accordingly, guilty of an offence under the subsection. [D. C.]

Commentary. The fact that the establishment was a refreshment house is important. The result might have been different if it had been a disreputable establishment or brothel or if the solicitation had been for the purposes of prostitution.

Whether insulting behaviour is of such a character that a breach of the peace may be occasioned by it would appear to be a question of fact and the ruling must be to the effect that there was no evidence on which the magistrate could find as he did.

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* Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For the defendant: *Michael Beckman* (instructed by Joelson & Co., 8 Hanover Sq., W.1). For the prosecutor: *Paul Wrightson* (instructed by Solicitor, Metropolitan Police).

EVIDENCE

Best evidence rule—no degrees of secondary evidence—parol evidence of document allowed although copy in existence—copy of carbon copy

R. v. Collins

Court of Criminal Appeal: Lord Parker C.J., Ashworth and Salmon JJ.: April 11, 1960.[2]

C. was convicted at quarter sessions of obtaining money by false pretences. The offence consisted of cashing a cheque for £5 at a garage. The cheque was returned marked " account closed." The manager of the bank was called by the prosecution in order to establish that C. knew that the account was closed. The manager produced a copy letter from the bank informing C. that his account was closed. The copy letter was not, however, the carbon copy of the original letter but purported to be a copy of the carbon copy. The prosecution also relied upon the evidence of C.'s landlady who said that she had taken to C. a letter from the bank informing him that his account was closed when C. had been in hospital. Further the prosecution relied on a schedule of returned cheques showing that over a considerable period of time C. had been cashing cheques all of which were returned to drawer. On appeal to the Court of Criminal Appeal:

Held, that the copy letter had been wrongly admitted because the bank manager had not stated that he had checked the document produced with the carbon copy on the file and that what he was producing was a true copy of the original letter. This court would not express any final opinion on the further points raised, namely (i) that the writer of the letter (a co-manager) ought to have been called and (ii) that only the original copy was admissible in evidence rather than a copy of the copy. The landlady's evidence was properly admitted. Parol evidence of the contents of a document could be admitted even where a copy was in existence. In view of the evidence of the landlady and of the schedule of returned cheques it seemed to this court that any jury properly directed would have been bound to convict C. and, accordingly, the proviso to section 4 (1) of the Criminal Appeal Act, 1907, would be applied and the appeal would be dismissed. [H. P.]

Commentary. The " best evidence " rule requires that the contents of a written document shall be proved only by the production of the original document, unless its absence can be satisfactorily accounted for. In the present case the original document was presumably unavailable because it was in the possession of the prisoner, who could not be required to produce it. If, on being requested to do so, he declined, it is clear that secondary evidence would thereupon be admissible and the carbon copy might have been put in evidence. The law does not generally recognise degrees of secondary evidence and, once secondary evidence has become admissible, oral evidence of the contents of a document may be given even though an attested copy be in existence: *Doe* d. *Gilbert* v. *Ross* (1840) 10 L.J.Ex. 201. So, in the present case, the oral evidence of the landlady was admissible notwithstanding the existence (presumably) of the carbon copy.

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[2] For the appellant: *C. G. L. Du Cann* (instructed by Sampson & Co., 11-13 St. Brides' St., E.C.4). For the Crown: *P. H. Layton* (instructed by John C. Gittins & Co., Oswestry, Shropshire).

According to Nokes, *Introduction to Evidence* (2nd ed) 387, " Since the seventeenth century a copy of a copy has been regarded as inadmissible for there is ' a chasm or gap in your evidence.' [Gilbert, *The Law of Evidence* (1756) 9.] But it is possible to bridge the gap by showing that the first copy was examined with the original and the second copy with the first, and that both copies are accurate."

HOMICIDE

Murder — manslaughter — insufficient direction given to jury on intention to cause grievous bodily harm—subjective test

R. v. Smith

Court of Criminal Appeal: Byrne, Sachs and Winn JJ.: May 10, 18, 1960: *The Times*, May 11, 19, 1960.[3]

S. was convicted at the Central Criminal Court of the capital murder of a police officer. The facts were that S. was driving his car when he was asked to stop by the police officer. S. did not stop and the officer clung on to the offside of the car. S. drove about a hundred yards, gaining speed and pursuing an erratic course, until the officer was shaken off and fell in front of an oncoming car. The officer received fatal injuries. The jury rejected S.'s defence that he had accelerated by accident and that he did not know that the police officer was hanging on to his car. On the issue of murder or manslaughter it was not suggested that S. had actually intended to kill the officer. The prosecution's case was that an intent to do grievous bodily harm was to be inferred; and the case for the defence was that S. had no such intent in fact and that the intent to do grievous bodily harm was not established as an inference from the facts. On appeal to the Court of Criminal Appeal:

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[3] For the appellant: *Edward Clarke, Q.C., Audrey Jennings* (instructed by Messrs. Prothero & Prothero). For the Crown: *Mervyn Griffith-Jones, Alastair Morton, Patrick Whelon* (instructed by the Director of Public Prosecutions).

Held, substituting a verdict of manslaughter, that the application of the maxim: "A man must be taken or presumed to intend the natural consequences of his acts" varied according to the particular facts of every case. Thus there was a class of case where the act of the accused must inevitably have caused grievous bodily harm, as where a blow with a sharp and heavy hatchet was deliberately aimed at and struck the victim. In such a case the maxim applied unless there was any evidence to rebut the presumption. However, in other cases a reasonable man would realise that his act might cause grievous bodily harm but the degree of probability would vary according to the facts of the case. In these cases the question was: "Did the accused actually intend the natural consequences of his acts?" The final question for the jury must always be whether an actual intent to do grievous bodily harm had been established. In the present case the degree of likelihood of serious injury to the police officer was not such that serious injury was certain to result; and there remained the further question whether S. really appreciated the degree of likelihood of serious injury during the relevant few seconds. It was not sufficient to direct the jury, as here, that the relevant intent could be inferred if a reasonable man would have contemplated that grievous bodily harm was "likely to result" or "might well" flow from the acts done. These matters provided no more than a pointer towards the solution of the question: "What was the actual state of mind of the accused?" The direction to the jury here had not contained a sufficient warning that S. should be acquitted of capital murder if there was a reasonable doubt that he actually intended to do grievous bodily harm. Accordingly it was not safe to assume that the jury fully understood the position and a verdict of manslaughter would be substituted for the verdict of capital murder. [H. P.]

Commentary. This very important decision appears to qualify the effect of *R.* v. *Ward* [1956] 1 Q.B. 351, a case which has been severely criticised by several writers. See S. Prevezer, "Murder by Mistake," [1956] Crim.L.R. 375, J. T. Lowe, "Murder and the Reasonable Man" [1958] Crim.L.R. 289 and [1959] Crim.C. & C. 7-8 and 54–55.

It would appear that the court, without overruling *Ward,* has restored a subjective in place of an objective test: *i.e.*, that the question for the jury, in the end, is always "What consequences did the *accused person* foresee?" and not "What consequences would a reasonable man in the position of the accused have foreseen?" In answering this question the jury may utilise the so-called presumption that a man intends the natural consequences of his acts. But, in the words of Denning L.J. "The presumption of intention is not a proposition of law, but a proposition of ordinary good sense. It means this: that as a man is usually able to foresee what are the natural consequences of his acts, so it is, as a rule, reasonable to infer that he did foresee and intend them. But while that is an inference, which may be drawn, it is not one which must be drawn. If, on all the facts of the case it is not the correct inference, then it should not be drawn": *Hosegood* v. *Hosegood* (1950) 66 T.L.R. (Pt. 1) 735.

Regarded as "a proposition of ordinary good sense" the presumption must vary in strength according to the circumstances. The more obvious it is that a particular consequence will follow from a particular act, the stronger is the presumption that it is intended. Thus, a blow with a sharp and heavy hatchet, other things being equal, would give rise to a much stronger presumption that it was intended to kill than a blow with a fist. The party who has to satisfy an onus of proof may introduce evidence which is so overwhelming as to make a conclusion in his favour the only reasonable one: *cf. Hill* v. *Baxter* [1958] 1 Q.B. 277; [1958] Crim.C. & C. 101; and similarly, it would seem, the presumption may be so strong as to leave only one reasonable inference; and then, according to the present case, the jury may properly be told that the accused *must* be taken to have intended the natural consequences of his acts. It appears that the court thought that *Ward*, unlike the present case, fell into this category. Thus Byrne J. said during the argument: "The facts [in *Ward*] were very different. In that case a man shook a small child very violently. Harm to the child must have resulted."

Counsel for the appellant argued that *Ward* was wrongly decided and counsel for the Crown conceded that "It may be that it does go further than earlier cases"; but, if the above interpretation of the present case is correct, *Ward* remains law though the sphere of its operation is curtailed and the way is open for future courts, if so minded, to distinguish it out of existence.

The position cannot be regarded as entirely satisfactory, for, if "the final question to the jury must always be whether an actual intent to do grievous bodily harm had been established," the judge is removing a question of fact out of the hands of the jury where he tells them that, if a reasonable man would have foreseen that the consequence would inevitably ensue, then they *must* find that the accused intended it. This, it is submitted, is contrary to principle; for "a judge obviously is not justified in directing a jury, or using in the course of his summing up such language as leads them to suppose that he is directing them, that they must find the facts in the way in which he indicates": *R.* v. *O'Donnell* (1917) 12 Cr.App.R. 219; and *cf. Woolmington* v. *D. P. P.* [1935] A.C. 462. *Ward* is therefore inconsistent with the rule that an actual intent must be proved and, it is submitted, ought to be overruled.

The Director of Public Prosecutions, with the fiat of the Attorney-General, is to appeal to the House of Lords. It is respectfully submitted that this is a very desirable course and that it is in the public interest that the law should be authoritatively stated by the highest tribunal.

LARCENY

Larceny by a bailee—act inconsistent with bailment not necessary

R. v. Wainwright

Court of Criminal Appeal: Byrne, Sachs and Winn JJ.: May 16, 1960: *The Times*, May 17, 1960.[4]

W. was convicted at quarter sessions of larceny. The facts were that W., who was a salesman, had been entrusted by his employers with certain goods which he had been instructed to sell at retail price. In fact W. had disposed of the goods at lower prices and had retained the proceeds of sale for his own use. W. appealed to the Court of Criminal Appeal on the main ground that the facts did not constitute the offence of larceny as a bailee; to constitute that offence the bailee must do something inconsistent with the purposes of the bailment, and here W. had been charged with the duty of selling the goods, which was what he did; in *R.* v. *Brackett*? (1850) 4 Cox C.C. 274, the accused had been acquitted on indistinguishable facts.

Held, dismissing the appeal, that W. had been entrusted with goods to be sold for the benefit of his employers, and it was implicit that they were to be sold at the prices stated. Instead he had sold goods at his own prices and for his own benefit. Section 1 of the Larceny Act, 1916, provided that a person might be guilty of stealing notwithstanding that he had lawful possession of goods as a bailee if he fraudulently converted the goods to his own use. The case of *R.* v. *Brackett* (1850) 14 J.P. 418; 4 Cox C.C. 274 had been decided eleven years before the equivalent provisions of the Larceny Act, 1861, had been enacted. In the opinion of the court what had been done here amounted to larceny as a bailee and this view was borne out by the similar cases of *R.* v. *Henderson* (1870) 11 Cox C.C. 593, and *R.* v. *Richmond* (1873) 12 Cox C.C. 495. Accordingly, the appeal would be dismissed. [H. P.]

Commentary. In *Brackett* the accused, the servant of a tailor, had authority to sell a pair of trousers for 15s. He sold them for 10s. and kept the proceeds. The Common Sargeant, after consulting Wightman J., held that these facts did not constitute larceny, no doubt on the grounds advanced by Parry (for the prisoner): "As far as the trousers were concerned, he did no more than he was authorised to do with them, namely, sell them; the fault was in accepting a less sum than he ought to have taken."

In both larceny by a bailee and larceny by a servant it is necessary to prove some act of conversion by a person who already has lawful physical control over the thing converted. The problem of what is a conversion seems to be precisely the same in both cases which differ only in the respect that the bailee has possession while the servant merely has custody of the thing converted. It is, therefore, respectfully submitted that *Brackett* was not properly distinguishable on the ground that it was decided before conversion by a bailee was made criminal by statute. If Brackett's act was not a sufficient conversion when done by a servant in custody of the trousers, it is difficult to see why it should be in the case of a bailee in possession with similar authority.

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[4] For the appellant: *James Pickles* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *J. Stanley Snowden* (instructed by the Town Clerk, Bradford).

Both *R.* v. *Henderson* and *R.* v. *Richmond* might be thought distinguishable on the facts from *Brackett*. In *Henderson* the prisoner was entrusted with jewellery to sell within a week and he sold it for his own purposes after the week had expired. He had no authority, therefore, to dispose of the goods in any manner or *at any price* whatsoever at the time when he did so. In *Richmond* the prisoner, who had been entrusted with silk to sell it, "appropriated it to his own use." It does not appear, however, what form the appropriation took, and he may well have disposed of it by some means other than sale. It was argued not that there was no conversion, but that he was not a bailee.

It is submitted that there is no substance in the distinction between *Brackett* and *Richmond* and that a sale is unauthorised and a conversion just as much if it is below the authorised price as if it is after the expiration of the authority to sell. It is submitted that *Brackett* is wrongly decided and is of no more authority in a case of larceny by a servant than in larceny by a bailee. The true rule, it is submitted, was stated in Ballantine's rejected argument in *Brackett*: "He was not authorised to sell them in the way he did, and the moment he dealt with them in a manner different from his instructions, he would be as guilty of stealing as though he had secretly taken them from his master's shop and converted them to his own use."

MAGISTRATES

Two persons jointly charged with offence—not necessary to convict or acquit both

Barsted v. Jones

Queen's Bench Divisional Court: Lord Parker C.J., Donovan and Davies JJ.: *The Times*, May 17, 1960.[5]

A and B were jointly charged with stealing and taking away eight brass boiler fittings. The magistrates found that there was not sufficient evidence to convict A, but that there was evidence to convict B. The magistrates were of the opinion, however, that as B had been jointly charged with A, who had been discharged, they could not convict B. On appeal by the prosecutor:

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[5] For the prosecutor: *P. H. Layton* (instructed by Bentley, Stokes & Lowless, for Turner, Bayley & Co., Dudley).

Held, allowing the appeal, and remitting the case to the magistrates with a direction to convict, that the magistrates' opinion was wrong.

Per Donovan J.: If the magistrates' decision were right, it would be equally logical to say that A should have been found guilty because B was guilty. [D. C.]

MANDAMUS

Power of court to compel performance of public duty by public officers

R. v. Woodbury Licensing Justices Ex p. Rouse

Queen's Bench Divisional Court: Streatfeild, Ashworth and Hinchcliffe JJ.: [1960] 1 W.L.R. 461.[6]

Licensing justices, who held their general annual licensing meeting on February 1, 1960, ordered that the second meeting should take place on the first Monday in March. Owing to the leap year, the first Monday in March fell on March 7.

Paragraph 5 of Part I of Schedule 2 to the Licensing Act, 1953, provides: "The times and places appointed for the second or any subsequent session of the general annual licensing meeting shall be such as appear to the justices convenient for persons intending to apply for justices' licences; and the times so appointed shall not be earlier than the sixth day after the session of the general annual licensing meeting at which they are appointed or later than one month after the first day of the general annual licensing meeting."

When applicants for licences attended the meeting on March 7, they were told that the justices could not hear their applications, because it was more than five weeks since the last meeting.

The applicants moved for an order of mandamus directing the justices to hear and determine the applications.

Held that the court had power to make an order absolute calling on the justices to hold a meeting for the purpose of hearing and determining the two applications. [D. C.]

Commentary. The court has power to compel the performance of a public duty by public officers, although the time prescribed by statute for the performance of it has passed: *Rochester Corporation* v. *The Queen* (1858) E.B. & E. 1024; 27 L.J.Q.B. 434: ". . . all statutes are to be read with reference to this known, acknowledged, recognised, and established power of the Court of Queen's Bench, to superintend and control inferior jurisdictions and authorities of every kind": *ibid. per* Martin B.

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[6] For the applicants: *Francis Irwin* (instructed by Field, Roscoe & Co., for Ford, Simey & Ford, Exmouth). The justices were not represented.

ROAD TRAFFIC

Cul-de-sac held to be a road within section 1 (1) *of the Road Transport Lighting Act,* 1957

Bass v. Boynton

Queen's Bench Divisional Court: Lord Parker C.J., Gorman and Ashworth JJ.: *The Times*, May 4, 1960.[7]

B. was charged with leaving his car without lights on a road during the hours of darkness, contrary to section 1 (1) of the Road Transport Lighting Act, 1957.

The justices found that B. left his car unlighted in Manor Park, a T-shaped cul-de-sac, in Northill. When the alleged offence was pointed out to B., he said that he did not consider that the car was on the road. Manor Park was, at this point, made up with houses on both sides and with a public footpath leading from its lower end. Being of the opinion that the cul-de-sac was not a road within the meaning of the Act, the justices dismissed the information. On appeal by the prosecutor:

Held, allowing the appeal, that the fact that Manor Park was a cul-de-sac did not determine it to be other than a road within the meaning of the Act. [D. C.]

Commentary. By section 17 of the Act "road" means any highway and any other road to which the public has access. Whether a place is a road within the meaning of this definition is a question of fact: *Griffin* v. *Squires* [1958] Crim.C. & C. 109. In *Newcastle upon Tyne Corporation* v. *Walton* [1957] Crim.L.R. 479 the Divisional Court reversed the finding of a recorder that a certain quayside was not a road, presumably because, in the view of the court, there was no evidence on which he could so find. A finding that a certain car park was not a road was held to be supported by the evidence in *Griffin* v. *Squires*. A forecourt may or may not be a road, depending on the circumstances: *Bugge* v. *Taylor* [1941] 1 K.B. 198; *Thomas* v. *Dando* [1951] 2 K.B. 620. The present case appears to be like *Newcastle, etc.* v. *Walton* in that the evidence admitted of only one possible answer, namely that the cul-de-sac was a road.

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[7] For the prosecutor: *W. Percy Grieve* (instructed by Gibson & Weldon for Poole & Co., Bedford).

SENTENCE

Appeal against two probation orders being effective together—distinction made between punishment and supervision

R. v. Keeley

Court of Criminal Appeal: Lord Parker C.J., Gorman and Ashworth JJ.: May 2, 1960: *The Times*, May 3, 1960.[8]

K. had been placed on probation by the Court of Criminal Appeal in March 1959 in respect of an offence of housebreaking and larceny for which he had been convicted at the O. quarter sessions ([1959] Crim.L.R. 470). He was subsequently convicted at the H. quarter sessions of a similar offence and was again placed on probation. Later, and within both probation periods, he was convicted at the S. quarter sessions of housebreaking, larceny and false pretence and was sentenced to eighteen months' imprisonment. On being brought before the H. quarter sessions he was sentenced to twelve months' imprisonment for the breach of probation; and on being brought before the O. quarter sessions he was sentenced to seven years' preventive detention for the breach. K. appealed to the Court of Criminal Appeal against the latter sentence.

Held, dismissing the appeal, that the sole point was whether the first probation order made by this court (which took effect as if it had been made at the O. quarter sessions) was still effective or alive once the H. quarter sessions had made the second probation order. It was quite clear that under the Criminal Justice Act, 1948, a man could not be under two probation officers in two different districts, and it had been contended that, therefore, the only effective order was that made by the H. quarter sessions. However, it did not follow that the first order was ineffective for all purposes; if it were, K. could go unpunished for his breach of that order. The first order might be ineffective with regard to supervision but it was effective to enable punishment to be awarded for the original offence. Accordingly, the appeal would be dismissed. [H. P.]

TRIAL

Murder—manslaughter—insufficient direction given to jury on intention to cause grievous bodily harm—subjective test

See *R.* v. *Smith* at pp. 491–493, *ante*.

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[8] For the appellant: *Gordon Hardy* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *B. C. Crawford* (instructed by the Director of Public Prosecutions).

Acts and Orders[*]

Agriculture

Endothal and its salts, phosphamidon, and a substance bearing the trade name of "Gusathion," are added to the poisonous substances specified in the Agriculture (Poisonous Substances) Regulations, 1956. The effect is that workers to whom those regulations apply may not, and their employers may not cause or permit them to, carry out certain scheduled operations with the specified substances unless prescribed safety measures including the wearing of protective clothing, are observed. Operative May 6, 1960. AGRICULTURE (POISONOUS SUBSTANCES) AMENDMENT REGULATIONS, 1960 (S.I. No. 793) (3d.).

For penalties for contraventions see section 4 of the Agriculture (Poisonous Substances) Act, 1952.

Birds

The area in the neighbourhood of Loch Garten, Inverness-shire, described in the schedule to the Order, is made a bird sanctuary. Entry into the area between April 1 and July 31 in any year is prohibited without permission from the Royal Society for the Protection of Birds, and offenders are made liable to the special penalties prescribed by section 12 (2) (*a*) of the Protection of Birds Act, 1954. Operative April 23, 1960. WILD BIRDS (LOCH GARTEN BIRD SANCTUARY) ORDER, 1960 (S.I. No. 760) (3d.).

For penalties for contraventions see section 12 (2) of the Protection of Birds Act, 1954.

Hire-Purchase

These Orders impose control on the disposal and possession of goods under hire-purchase and credit-sale and hiring agreements. The Orders relate to the goods specified in the First Schedules to the Orders disposed of or held under agreements entered into after April 28, 1960. Provision is made for a minimum deposit and a maximum period of payment under hire-purchase and credit sale agreements, and for hiring agreements to be for a definite period of not less than three months or for an indefinite period and for the payment of the first three months' rental before the signing of the agreement. Both operative April 29, 1960. HIRE-PURCHASE AND CREDIT SALE AGREEMENTS (CONTROL) ORDER, 1960 (S.I. No. 762) (5d.); CONTROL OF HIRING ORDER, 1960 (S.I. No. 763) (4d.).

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[*] Prepared by F. MAURICE DRAKE, *Barrister-at-Law.*

For penalties for contraventions see regulation 92 of the Defence (General) Regulations, 1939.

The disposal and possession of goods to which S.I. 1960, No. 762, above, applies under hiring agreements entered into after April 28, 1960, which provide for the making of payments of the kind described in Article 2, is prohibited. Operative April 29, 1960. CONTROL OF HIRING (REBATES) ORDER, 1960 (S.I. No. 764) (3d.).

For penalties for contraventions see regulation 92 of the Defence (General) Regulations, 1939.

London Traffic

The following Orders have been made detailing prescribed routes: S.I. Nos. 696 (Brentford and Chiswick) (3d.); 697 (Hammersmith) (2d.); 721 (Westminster) (2d.); 778 (Lambeth) (3d.).

The following Orders have been made revoking previous Orders detailing prescribed routes: S.I. Nos. 785 (Paddington, revoking S.I. 1953, No. 60) (2d.); 802 (Finchley, revoking the London Traffic (Prescribed Routes) (No. 40) (Addison Way, Finchley) Provisional Regulations, 1939) (2d.).

The following Orders have been made prohibiting waiting: S.I. Nos. 722 (Hertford) (3d.); 803 (Sevenoaks) (3d.).

The following Order has been made revoking earlier Orders relating to weight restrictions and speed limits in Slough: S.I. No. 723 (revoking S.I. 1950, No. 1807 and 1953, No. 1748) (2d.).

Poisons

Certain substances are added to the Poisons List and recent changes of nomenclature are taken into account. The complete list as now amended is set out in the Second Schedule. Operative April 19, 1960. POISONS LIST ORDER, 1960 (S.I. No. 698) (6d.).

Previous Poisons Rules (which are specified in rule 35 (1) of these Rules) are consolidated with amendments, the principal amendments being as follows. By reason of amendments to rules 5 and 12 the requirements of rule 12 (3) as to the form of prescription and of rule 5 as to labelling are relaxed as respects certain poisons previously included in the Fourth Schedule (which sets out the poisons which may be sold by retail only upon prescription) and these poisons are now set out in a separate part of the

Schedule, Part B, which includes also other poisons and some added to the Poisons List by S.I. 1960, No. 698, above. The requirements of section 19 (3) of the Pharmacy and Poisons Act, 1933 (which requires particulars of medicines supplied or dispensed under that section to be entered in a book) are relaxed by rule 8 in the case of certain prescriptions given by a registered dentist. The provision of rule 7 (3) (*c*) of the Poisons Rules, 1952, requiring that an article to which rule 7 (3) applies should, if sent by post, be sent by registered post, is omitted. Rule 16 is amended so that a certificate authorising the purchase of monofluoroacetic acid or its salts is required to state the quantity authorised to be purchased and so that the seller is required to retain the certificate. Rule 22 (3) (which provides that where a poison other than a poison included in the First Schedule is sold in the container and outer covering in which it was obtained by the seller the name and address of the seller need appear only on the outer covering) is now extended to all poisons. There is added to the Seventh Schedule a new paragraph (*q*) requiring the labelling of certain medicines for the prevention of motion sickness. The First and Fourth Schedules are amended to take account of poisons added to the Poisons List by S.I. 1960, No. 698, above, and account has been taken of changes of nomenclature and classification. Operative April 19, 1960. POISONS RULES, 1960 (S.I. No. 699) (1s. 9d.).

For penalties for contraventions see section 24 of the Pharmacy and Poisons Act, 1933.

Probation

The 1959 Rules (S.I. 1959, No. 1901) are replaced. Express provision is made in Rule 10 for the granting of leave with pay. Rule 7, which relates to the travelling and subsistence expenses of Probation Officers, has been transferred to these Rules from the Probation Rules, 1949. Operative April 11, 1960. PROBATION (CONDITIONS OF SERVICE) RULES, 1960 (S.I. No. 717) (5d.).

Scotland

Police cells at Inverary and Banff are no longer legalised for the detention of certain prisoners, as set out in the Schedule to these Rules. Operative May 16, 1960. DISCONTINUANCE OF LEGALISED POLICE CELLS (SCOTLAND) RULES, 1960 (S.I. No. 693) (3d.).

The time during which particulars of germination of certain grass and clover seeds may be given to a purchaser by a seller of those seeds is extended for a period in the year 1960. These extensions only take effect as regards sales in Scotland of seeds specified in this licence made during the period April 6 to May 15, 1960, inclusive. The time for delivery of particulars other than those of germination remain unaffected by this licence. Operative April 6, 1960. GRASS AND CLOVER SEEDS (SCOTLAND) GENERAL LICENCE, 1960 (S.I. No. 713) (3d.).

Theatre and Cinematograph

Previous Regulations as amended are consolidated with minor amendments. The earlier Regulations are S.I. 1957, Nos. 1341 and 1342 as amended by S.I. 1958, Nos. 837 and 270 and S.I. 1959, No. 725. The main amendments are that in future the levy is to be paid by exhibitors of all films exceeding 16 mm. in width and not only, as hitherto, by exhibitors of standard 35 mm. films; and provision is made for a share of the proceeds of the levy to be paid to the makers of certain British films exceeding 16 mm. instead of only to the makers of British films exceeding 35 mm. as hitherto. Operative April 17, 1960. CINEMATOGRAPH FILMS (COLLECTION OF LEVY) (DISTRIBUTION OF LEVY) REGULATIONS, 1960 (S.I. Nos. 726 (3d.) ; 727 (6d.)).

For penalties for contraventions see section 4 of the Cinematograph Films Act, 1957.

Regulations have been made which prescribe (1) the form in which applications for registration of British newsreels shall be made ; (2) the fee payable in respect of these applications ; and (3) the time and manner in which notification of particulars of British newsreels must be sent by renters to exhibitors thereof. Operative April 24, 1960. CINEMATOGRAPH FILMS (REGISTRATION OF NEWSREELS) REGULATIONS, 1960 (S.I. No. 712) (4d.).

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 11 *New Fetter Lane, London, E.C.4." The questions of readers only are answerable in the Review. All questions should be submitted in triplicate. The Publishers cannot accept any responsibility for the correctness of the replies.*

70. *Witnesses—contradiction of sworn and unsworn statements*

In criminal trials if a witness having made an unsworn statement to the police in which he does not incriminate the accused, then gives sworn testimony at the trial contradicting his previous unsworn statement in substantial and material particulars and incriminating the accused, is it not the duty of prosecuting counsel to show the original unsworn statement to the judge and to ask leave to cross-examine the witness as a hostile witness in the interests of justice? Or has the prosecuting counsel to do this only in a converse case, where the witness incriminates the accused in his unsworn statement to the police while he does not do so in his sworn testimony?

I am prompted to have your opinion in view of the observations of Lord Goddard in *R.* v. *Fraser and Warren* [1957] Crim. L.R. 51.

Moreover, what is the position in a criminal trial where a prosecution witness has given sworn testimony fundamentally different from his previous unsworn statement and has not been declared a hostile witness; is the court to decide his credibility as a witness on the basis of his explanation of the substantial variance between his original statement and sworn testimony, or should the court regard his sworn evidence as negligible by reason of his previous unsworn statement as laid down in cases pertaining to hostile witnesses? [K. H.]

ANSWER

(1) *R.* v. *Fraser and Warren*, to which you refer, lays down that where a witness has made a statement incriminating the accused and then, in his sworn testimony during the trial contradicts that earlier statement, it is the duty of prosecuting counsel to ask leave to cross-examine him as a hostile witness. This is clearly in the interests of justice for it indicates, prima facie, that either the witness was originally lying or that pressure has been put on him to change his story and commit perjury during the trial. Clearly the defence counsel has no interest in attacking the new

evidence which does not incriminate the accused; and as it is not the judge's function to conduct a cross-examination the duty must fall on prosecuting counsel. If he neglects to do that duty then, in the interests of justice, the judge may do it, and in those circumstances the judge's action will not afford any grant for appeal by the accused.

If, however, the converse occurs, and a prosecution witness who has previously made a statement in which he does *not* incriminate the accused makes a contrary statement on oath then it is not the duty of prosecuting counsel to cross-examine the witness, but he should acquaint the defence of the earlier contradictory statement and leave the defence to cross-examine that witness.

This is in the interest of the accused since cross-examination by his own counsel is likely to be far more effective, especially if it has not been spoiled by ineffective cross-examination by prosecuting counsel.

If the accused is not represented then I think prosecuting counsel should show the prior contradictory statement to the judge as well as the accused and follow whatever guidance the judge deems it right to give.

(2) I think that the court should decide his credibility as a witness in the light of the explanation put forward. If the explanation is convincing then the jury should be directed to consider the explanation and, if they accept it, to place such weight on his evidence as they deem fit. If the explanation is unconvincing then the judge should warn the jury that his evidence is dangerous and ought to be considered only with the greatest possible caution. [F. M. D.]

Letters to the Editor

Traffic Procedure in Western Australia

Sir,

I note with interest the proposed use of traffic wardens in the London area. A similar scheme to relieve the police of work in connection with parking and similar offences has been in operation in Perth, Western Australia, since 1958.

The City of Perth Parking Facilities Act, 1956, provides for parking regions in the city area. Within these regions the municipal council has authority to instal parking meters and to operate other parking facilities. The municipal corporation is primarily responsible for the control of parking in these areas and is empowered to make by-laws regulating parking and to prescribe penalties for breaches of parking by-laws. The maximum penalty by statute cannot exceed £20 and the council is also authorised to prescribe for any offence under the by-laws a "modified penalty." This "modified penalty" is payable to the council by an offender who does not contest an allegation that he has committed a breach of a parking or similar by-law.

The council has authority to create a department and to appoint inspectors and other officers for the purpose of carrying out its powers and functions under the Act.

Responsibility for the collection and recovery of penalties for offences under the Act is placed on the municipal corporation.

Police officers are still under a duty to assist inspectors and have all the powers of an inspector, but in practice it is the duty of the inspectors to detect breaches of the parking by-laws and institute and carry on proceedings against an alleged offender. The municipal corporation has the power to review any act or decision of its own inspector but has no power in respect of the decision or actions of a police officer.

The Perth City Council with the approval of the Minister of Transport is empowered to prescribe the method and means by which penalties are to be recovered. Proceedings against any person alleged to have committed an offence against the Act may still be instituted and carried on in a Court of Petty Sessions in the normal way, although the proceedings may be conducted by a traffic inspector as distinct from a police officer.

An inspector on detecting an offence leaves a prescribed form on the car. This notice specifies the offence and also the "modified penalty" for the offence. At present the modified penalty has been fixed at 20s. but can be altered from time to time by by-law. There is a further endorsement to the effect that, subject to the council's right to refuse to accept payment, if the offender completes the admission of guilt at the bottom of the form, and returns it to the council together with the modified penalty within seven days, no further proceedings will be taken. Payment may be in cash, cheque or by postal order.

It is made quite clear to the offender on the form that he is entitled to ignore the notice and require a court hearing. If the offender decides to pay the modified penalty he completes the admission of guilt and forwards it to the council together with payment of the modified penalty, and obtains a receipt which is a valid defence to any further action.

If he ignores this notice he receives a further notice which informs him of his right to a court hearing and offers him the opportunity of paying the modified penalty within fourteen days of the date of the notice. This notice is endorsed to the effect that if no admission with payment is received within the stipulated time it will be assumed that the alleged offender desires a court hearing. A complaint is then made under the Justice Act in the normal way.

This second notice contains a mild threat that if the matter goes to court and the offender is convicted he is usually required to pay solicitors' fees and court costs in addition to the fine.

Fines, together with fees for parking services, are paid into the municipal corporation's " Parking fund " and the moneys used to defray expenses and to carry out the wide powers and duties placed on the corporation in respect of the provision and maintenance of parking facilities.

The Act stipulates that an inspector may only " with the approval of the council or a person authorised by it, institute and carry on " any proceedings for an alleged parking offence. The person authorised is the chief parking inspector and there is in fact no interference by the council in the exercise of his discretion. Where a complaint is made that a person has been unfairly treated in respect of an alleged offence, the chief officer investigates the matter and then decides whether or not to proceed. If he decides not to take action he records the reasons for his decision. Where no complaint is made the ordinary procedure is automatically followed and either the alleged offender pays the " modified penalty " or court action is commenced. The proper exercise of the discretion vested in the chief officer appears to be a valuable safety valve from the point of view of good public relations, and is an attempt to reduce the number of " hard cases," as the officer will take into account genuine excuses such as illness or accident. There is no question of council members being influenced to " fix traffic tickets " for friends. It is estimated that approximately 70 per cent. of alleged offenders pay the " modified penalty " without court action.

Out-of-town drivers present a problem in that if a driver ignores the invitation to pay the " modified penalty " it is difficult for the council to make the necessary inquiries before court action is taken, particularly where the name of the driver is not known, and frequently no further action is taken. If necessary, inquiries could be made through country police stations, but at the moment it is not considered worth-while involving the police in these inquiries. There is an obligation on the owner of a vehicle to give information as to the driver on a particular occasion.

The new procedure has proved very successful; even payment by cheque has resulted in very few cheques being returned " refer to drawer."

Prior to the introduction of this Act in 1955 the Traffic Act was amended to authorise " the infliction and collection by prescribed officers of the Public Service of penalties " for stipulated minor offences.

The prescribed officer is the Under Secretary for Law and the procedure of "ticket" and "modified penalty" was adopted. If the offence is a stipulated minor offence then the alleged offender is given the option of paying the "modified penalty" or being dealt with by the court. The "prescribed officer," considers the report submitted to him by a police officer that a person has committed a "minor offence" and he may within six months of the day of the offence serve a notice offering to accept payment of a "modified penalty."

The number of cases involving minor traffic offences which actually come before a magistrate for hearing has been reduced considerably by the adoption of this procedure. At the same time the right of every person to be dealt with by a court of law has been preserved. In the case of a persistent offender no option need be given and he can be brought before the court on a summons in the usual manner and be fined according to the maximum penalty.

Western Australia has followed Victoria and accepted the recommendations of the Australian Transport Advisory Council in providing for voluntary blood tests of persons suspected of driving under the influence of intoxicating liquor. Evidence may be given (by certificate of the doctor and analyst in the first instance, subject to the right of any party to require oral evidence) of the taking of a blood sample within eight hours after the alleged offence and of the percentage by weight of alcohol in the blood. If the percentage is ·05 or less, it is prima facie evidence that a person is not under the influence. If more that ·05 and less than ·15 per cent. this fact is considered together with other relevant evidence but gives rise to no presumption; if the percentage is ·15 or more it is prima facie evidence that the person was under the influence at the time. The Road Safety Council stressed that the blood alcohol level must be used only to supplement all other evidence.

R. W. CANNON,
Barrister-at-Law.

Perth, Western Australia.

The Drinking Driver and the Law

Sir,

In the article of your March number of this year called "The Drinking Driver and the Law" your special correspondent has somehow or other omitted altogether the use of urine for alcohol analysis.

Yet, Taylor's *Principles and Practice of Medical Jurisprudence*, Vol. II, 11th ed., says:

> "Urine examination may therefore be used instead of blood examination and gives a reasonably accurate idea of the total alcohol in the body."

In the booklet called *Recognised Intoxication*, Revised Edition, 1958, it states "Urine serves the desired purpose equally well as blood and has the advantage that the samples are easy to collect. The Committee therefore recommends that, except in special circumstances, urine should be the body fluid used."

The Report of the British Medical Association on the 1960 experiments and findings published in the *British Medical Journal* gave figures for both urine and blood.

Yours sincerely,

AYRES L. RIBEIRO,
M.A.(Cantab.), L.R.C.P., M.R.C.S.

Police Surgeon,
Kenya.

[Dr. Havard writes: "I would entirely agree with the extract from Taylor's *Medical Jurisprudence* that urine examination gives a reasonably accurate idea of the total alcohol in the body. It is, however, usual to refer to blood alcohol, as deterioration in driving ability is directly related to the effect of alcohol upon the nervous system, which is of course perfused with blood. Generally speaking when a bio-chemical test has been carried out on breath, urine or other fluid the necessary correction is made and the finding is expressed as concentration in blood. The breath test was singled out for special mention as for the first time a reasonably reliable method of estimating the blood alcohol by taking a sample of breath is now available and this has distinct advantages in the collection of specimens.

There has been some criticism of urine as a reliable indicator of the concentration of alcohol in the blood owing to the possibility of dilution if the bladder has not been emptied prior to a specimen being taken. It is interesting to note that Professor Drew in his experiments found that samples taken with the bladder full were slightly more variable but did not differ significantly from those taken after the bladder had been emptied. The concentration of alcohol in the urine builds up more slowly than in the blood and reaches a peak concentration 20–25 minutes later than in the blood. The fall off is proportionate to the fall off in blood alcohol concentration, the value being proportionately higher. The overall ratio of urine to blood alcohol was found in Drew's experiments to be 1·252 : 1.]

Books and Periodicals

Book Reviews:

An Introduction to Criminal Law. 4th edition by Rupert Cross and P. Asterley Jones. London: Butterworth & Co. 1959. 472 and (index) 35 pp. 35s. net.

Three editions of this well-known students' textbook appeared in the first five years of its life and now, after a lapse of six years, the authors have again revised their work. This time they have made drastic alterations. In earlier editions the part devoted to criminal procedure ("The Machinery of the Criminal Law") was sandwiched between the discussion of general principles ("The Nature of Criminal Law") and the account of the particular crimes ("The Content of the Criminal Law"). This unnatural division of the substantive law of crime is avoided in the new edition by the removal of "The Machinery of the Criminal Law"—which now incorporates the chapter on evidence—to a more orthodox place at the end of the book. This is a distinct improvement in layout. More important are the changes in the text. Like most other textbooks, *Cross and Jones* has tended to get bigger with successive editions; and one reviewer of the third edition complained that it was in danger of falling between two stools in that the more critical and argumentative outlook of that edition tended to make is less suitable for beginners than its predecessor, while it was insufficiently detailed for the expert. It was almost inevitable that the new edition should continue to follow the trend of its forbears and the authors declare in their preface that they have endeavoured to render the treatment of the subject "both clearer and more academic" and that "the work is now primarily intended for the university student, although it is hoped that it may prove useful to a wider class of reader." Extensive rewriting, involving an increase of 95 pages in the length of the book, has been carried out in fulfilment of these aims and it is fair to say that they have been achieved. In the reviewer's opinion it is now the best textbook on criminal law available for undergraduate study; yet its method of exposition by numbered articles and comments is probably well-suited to non-academic readers—magistrates, policemen and others—who seek a fuller understanding of the criminal law.

The particular virtue of *Cross and Jones* is to be found in its consistent attempt to state the law as it is (a more difficult feat in the criminal than in most other branches of the law) without glossing over the difficulties, and without attempting to make the law appear more certain than it really is. Where the law is controversial, both sides of the argument are fairly put—as, for example, on the scope of fraudulent conversion at pp. 223–224. The references to periodical literature are well chosen; for they are ample without being so voluminous as to deter the student from following them up at all. The reader who makes a careful study of this well-balanced statement of the law and supplements it by reference to the periodical literature referred to will be well-informed indeed and fully equipped for any examination in the criminal law.

Readers are invited by the authors to comment on the merits of including a summary of the law of evidence applicable to criminal cases. In your reviewer's opinion the 64 pages occupied by this summary would be better devoted to a more detailed treatment of the criminal law. Evidence is a worthy undergraduate course in its own right—as Dr. Cross's own work on the subject admirably illustrates —and is generally recognised as such.

The observations which follow relate to matters of detail and there is room for more than one opinion regarding most of them; but they may, perhaps, be worthy of consideration for a fifth edition which will unquestionably be called for in due course.

The view, rejected by the authors (p. 86), that the *ratio decidendi* of *R.* v. *Wheat and Stocks* is that Wheat had no reasonable grounds for his belief, seems preferable to your reviewer. As the court found this to be the case, anything they said about a man with a reasonable belief did not relate to the case before them and must surely be *obiter*. The proposition (p. 101) that an accessory before the fact to a felony must have "an element of desire that it should be committed" is difficult to reconcile with the dicta in *National Coal Board* v. *Gamble* which are quoted on p. 105. It is surely very doubtful indeed whether it is still lawful to kill a felon simply in order to capture or recapture him (p. 122) and reference might be made to the Australian case of *R.* v. *McKay* (1957) Victoria Reports 650; (1957) Argus L.R. 648, and Professor Norval Morris's article in 2 Sydney L.R. 414. More serious is the proposition (p. 123) that "A homicide is also lawful where death is caused by an act done by the accused in defence of his property." This is much too wide and is certainly not warranted by *R.* v. *Hussey*.

It is not clear to your reviewer why it is so certain that conduct like that of the accused in *R.* v. *Martin* could not be held to amount to causing grievous bodily harm with intent (p. 158). Whether the specific intent exists is a question of fact and Martin's conduct surely afforded prima facie evidence of the specific intent. Is not the only difference in *mens rea* (with respect to grievous bodily harm) between section 18 and section 20 of the Offences against the Person Act that, while intention or recklessness will suffice for the latter, only intention will satisfy the former?

The statement of the law in Article 61 (Receiving) is misleading and fails to take account of *D. P. P.* v. *Neiser*, which is briefly referred to in the comment (p. 233) but requires further consideration. The suggestion (p. 231) that the parents in *Walters* v. *Lunt* might be considered to have stolen the tricycle from their child is surely very far-fetched. Their sin was that they were unwilling to deprive young Richard Norman of his ill-gotten toy, not that they took it from him without his consent.

The explanation (p. 199) of *R.* v. *Buckmaster*, "that the prosecutor did not intend that the bookmaker should become the owner of the half-crown until the bet was lost or an equivalent sum returned on the bet being won," accords with the judgment in that case; but it is unfortunate that the authors adopt as their own a construction of the facts which, with respect, is contrary to common sense and must puzzle the intelligent reader. A reference to Mr. Turner's criticism of this case and of *R.* v. *Russett* would be helpful. It might, perhaps, be noted (p. 238) that the demand made in *R.* v. *Denyer* would probably be criminal at the present day because of the Restrictive Practices Act, 1957.

The acceptance (p. 296), in the teeth of the decisions in *R.* v. *Closs* and *R.* v. *Smith*, of Mr. Turner's definition of a document for the purposes of the law of forgery is a departure from the authors' usual principle of stating the law as it is. Might not the definition be reconciled with the cases by the modification suggested by Dr. Williams in an article (to which reference is made) at 11 M.L.R. 150, 160? If " the thing is intended to have utility apart from the fact that it conveys information or records a promise," it is not a document.

The statement of the Judges' Rules (p. 324) might be supplemented by at least a reference to the Home Office Circular of June 24, 1930 (see *Archbold*, § 1119), without which they are distinctly misleading.

The book is well produced, few misprints were noted, and (though the price has gone up by 5s. since the third edition and 14s. since the first), at 35s., it is still good value for money—as law books go.

J. C. SMITH.

The Anatomy of Prison. By Hugh Klare. London: Hutchinson. 1960. 139 pp.; (Appendices) 21 pp. 18s. net.

In less than two hundred pages Hugh Klare has produced a most excellent handbook on prisons. It should be widely read both by those within the prison service, who will find their problems sympathetically discussed, and by all interested members of the public. This is the ideal publication for concise information on prison problems. The general public are, for the most part, dependent on sensational newspaper stories of ex-convicts or are condemned to plough their way through Prison Commission Reports. The *Anatomy of Prison* should be in the hands of all Members of Parliament and should become the " bible " of prison reformers in the same way that Dr. Bowlby's *Maternal Care and Mental Health* (1951) became the guide to Children's Committees.

The very great merit of this book is Mr. Klare's power of " empathy," that is the capacity to feel into another person's situation. This is particularly strong in relation to Prison Officers, whose problems in the changing conditions of today are carefully discussed in Section 2, Part 4.

The first two chapters are of a fairly general character dealing with the concept of prison and the atmosphere in the actual buildings which are in use today. The deep psychological forces which lead law-abiding citizens to fear criminals and wish to shut them up and punish them are clearly drawn. " Prison is a powerful psychological symbol. It is a place where people who do bad things—things which we may sometimes be tempted to do ourselves—are kept apart and held in check." As Mr. Klare points out the number of really dangerous men in prison is quite small and there is little reason to keep the thousands of comparatively harmless offenders behind massive walls and doors of steel. Yet each proposal to open a new Open Prison is met with fierce outcry in the neighbourhood and the public live in great fear and dread—that is until they have some direct contact with prisoners and find them men much like themselves. Once the public in a given area have some access to the prisoners the phantasy " bad men " begins to give way to the picture of a human being with grave personal problems who needs to be helped and rehabilitated. Thus the ideal of penal administrators, of reform and rehabilitation, gradually permeates to the general public. " Perhaps it needs to be more clearly understood, too, that an improvement in prison conditions is not necessarily synonymous with rehabilitation, and that, so far from pampering prisoners, more effective rehabilitation measures may well make greater demands upon them than some present methods of treatment."

Sections 2 and 3 deal with Prison Communities and individuals in jail, both offenders and staff of all ranks. The feelings and tensions of the various groups and individuals have been most skilfully drawn. Mr. Klare says, in his introductory note to the first of these sections, that he is an outside observer and though he does not *know* what it is to work, or be held captive, in prison, he feels he can bring the picture into perspective perhaps more successfully than those immediately bound up with the problems. A new dimension can be gained. He has succeeded most admirably in this endeavour. There is a careful analysis of the evolution of leadership in prison showing how, " The abnormal, irresponsible, immature and criminal community throw up leaders in whom these traits are strongly represented." The position of power and *modus operandi* of the well-known tobacco barons is described in detail. The tobacco baron is a somewhat mythical figure to the general public; Mr. Klare brings him into perspective in the prison community.

The problems of prison life are discussed in section 4. Overcrowding, lack of constructive work, sexual tension and isolation are well-known difficulties; but Mr. Klare has much that is wise and constructive to say. Possibly he overlooks the fact, when he urges more contact with relations and the outside world, that there certainly are offenders whose criminal behaviour is precipitated by factors in the home environment. These individuals can only be helped by complete severance with their background.

The last part of the book, " Pattern of the Future," describes the system as it is now, the proposals made in the recent White Paper and finally Mr. Klare's own suggestion for an experimental small maximum security prison, housing 150 persons of mixed type divided into groups of 12 and 13. This institution would be in the nature of a therapeutic community. The emphasis would be on group living. Both staff and prisoners would live and work in an atmosphere of group discussion and endeavour; the stronger characters among the prisoners would have an opportunity to influence their weaker brethren. The three broad general aims would be " to give prisoners and staff more insight; to provide facilities for identification with staff by prisoners; and to provide opportunities for pressure towards role-taking."

Mr. Klare's proposals will provoke stimulating discussion amongst all those interested in penal reform. In the present age when so many of the nineteenth century reformative societies have largely ceased to make a useful contribution, it is most refreshing to find that the Howard League for Penal Reform has, in the person of Hugh Klare, a Secretary with such insight into current psychological thought and practice. This indeed carries the work of John Howard and the early reformers into the second half of the twentieth century.

T. E. JAMES.

Stone's Justices' Manual. 92nd edition by J. Whiteside and J. P. Wilson. London: Shaw & Sons; Butterworth & Co. 1960. 2 vols. Thick edition £4 12s. 6d. net. Thin edition £4 17s. 6d. net.

The annual appearance of *Stone's Justices' Manual* is welcomed by all busy practitioners, whether or not they undertake criminal work, because, such is the scope of this publication, it is of great assistance even to lawyers who never appear in a criminal or litigious court. No wise advocate delays purchasing a new edition, and it is unfortunate that all police forces do not ensure that each of their lay prosecutors has with him in court the newest edition; all too often, such men are required to undertake an important and onerous task with a long out-of-date *Manual*.

Although the editors take trouble to ensure that their *Manual* contains all available information, like any other law book decided cases cause it to be out of date on the day of publication, and so a half-yearly supplement would ease the task of all subscribers.

The usefulness of the publication would be further increased by the inclusion at the end of each volume of a table in which were set out the maximum penalty for, and the courts having jurisdiction to try, each offence. Court clerks and advocates are often heard to rue the absence of such a table, the presence of which would avoid much research in the *Manual* itself.

Excluding the indices, the 1959 edition of the *Manual* contained 3,107 pages, whereas there are 3,141 pages in the current edition, and, presumably, we may expect that there will be increases in future editions, thus making the two volumes even bulkier to handle and carry. There is much material in the publication to which reference is not made during a trial, and which could well be omitted from the two " work-a-day " volumes. The omission, for instance, of the sections headed " Court and Clerk," " Magistrates' Courts," " Practice," and " Evidence," alone would save 370 pages without diminishing the value of the publication to the advocate while " on his feet." The material within, particularly, these sections must not be lost. Few who appear in the magistrates' courts will deny that much injustice is done as a result of a general and, occasionally, abysmal ignorance of the information contained in these four sections, and particularly that headed " Evidence." Although everyone—magistrates, court clerks, and advocates—would do well to read and re-read these excellent sections, they are at present, necessarily but unfortunately, succinctly written and not pleasurable to digest. Material such as this deserves a simpler presentation, and were it to be collated in a third volume of the *Manual*, expanded, and set in a larger, more readable type, we would have an invaluable book, of which, hitherto, there has been no duplicate. Were all who are engaged in the administration of justice to read and act upon the information contained in such a third volume, the standard of behaviour in, and, it follows, the quality of justice meted out by, the magistrates' courts would improve.

Considering the size of the *Manual*, the index is excellent, and, yet, many complain that they have difficulty in finding information, particularly when engaged in a trial. At such a moment, it must be acknowledged, an index, no matter how comprehensive it may be, is not what is required; when using a reference book of this nature it should be possible to find what is required without reference to the index, and the setting of relevant Act and section heading in a heavy type, rather than, as now, merely bracketing them, would do much to obviate this criticism.

What of the general contents of the *Manual*? All lawyers have pet cases upon which they rely, extending and distending their import to meet all manner of contingencies, and, no doubt, some will complain of the omission or misinterpretation of such favourites, but, in truth, they have no real cause for complaint, since almost all that a practitioner requires in the field intended to be covered by the *Manual* is to be found within its 3,141 pages, and deliberately to search for and emphasise some minor flaw (if one exists) would be unmannerly and foolish.

Readers may wonder why this review, which at the outset emphasises the need for every lawyer to include a current *Manual* in his library, should, thereafter, be so critical. The reviewer has, however, been " brought up " on *Stone's Justices' Manual* and has come to rely upon it as he would upon a tried and proved friend; a friend that has seldom been found wanting and, as a result, of whom more and more is expected each year.

BRIAN FRASER HARRISON.

Sir Travers Humphreys—A Biography. By Douglas G. Browne. London: George Harrap. 1960. 378 and (index) 6 pp. 22s. 6d. net.

This is for the most part a pleasant enough account of the most famous cases in which Sir Travers, as counsel and judge, played a part. Individual cases have been more lucidly and excitingly recounted by others, among them the judge himself. What one looked for in this " biography " was some indication of the subject's development as counsel, some tolerably intimate portrayal of the ideas and personality of a leading participant in the administration of criminal justice over a period of sixty years. One would not wish to suggest that Sir Travers does not in some measure come through in this book: he runs like a thread through the patchwork of stories of the *cause célèbres*, and the thread spells fairness, lucidity, industry and exuberance. But there does not seem to have been material for a genuine work of biography. There can, surely, be no other explanation of the fact that, for instance, fifteen pages are devoted to the case of " Brides-in-the-bath " Smith, the relevance of this to Humphreys' life-story being, apparently, that he " found time . . . to take his share in the preparation of the case " (p. 144) and that he later tried Haigh, who also murdered for profit. The British public makes several appearances in the book in the role of a subsidiary villain.

E. J. G.

In Some Authority. By Frank Milton. London: Pall Mall Press. 1960. 168 pp. 16s. 6d. net.

This small book contains an excellent account of both the history and present-day practice and procedure of the magistrates' courts. Mr. Milton draws widely on his own experience to illustrate the points he seeks to make, pressing them home with anecdote and quotation. The result is a lucid and readable book, which will provide a painless introduction to their duties for new J.P.s and a pleasant account of the workings of our magistrates' courts for the layman who likes to know how things are done.

A. L. N.

The Jury is Still Out. By Irwin D. Davidson and Richard Ashman. London: Peter Davies. 1960. 303 pp. 21s. net.

This account of the trial of eighteen boys aged between fourteen and eighteen for the murder of a fifteen-year-old boy, told by the judge who tried them, shows very clearly why the United States are distressed about their juvenile crime rate. The long drawn-out proceedings seem to emphasise the futility of all the courts can do in the present social set-up among young men. Judge Davidson is himself very much concerned with the problems which gave rise to this trial and the failure of this or any other trial or sentence to solve it. In an Appendix which gives value to an otherwise sordid and nauseating story, he sets out his own ideas as to how incipient juvenile delinquents can be diverted from crime. His plan is being considered by the New York State Youth Commission.

A. L. N.

Not Proven. By John Gray Wilson. London: Secker & Warburg. 1960. 255 pp. 25s. net.

Under Scots law, juries have a choice of three verdicts instead of two, the third choice being a finding of not proven. This verdict is often adopted where the jury think that the accused committed the crime, but are not satisfied beyond that reasonable doubt which the law requires, or are not satisfied that the Crown have proved their case. In the introduction to his new book, J. G. Wilson, who is a distinguished Scottish Sheriff Court judge, traces the origin of what Sir Walter Scott called "that bastard verdict." There then follows an analysis of four famous cases, chosen not to prove any thesis, but rather on account of their intrinsic interest. The cases are those of Christine Gilmour (1844), Madeleine Smith (1857), Alfred Monson (1893), and John Donald Merritt (1926). They are retold with that lively freshness which characterises the learned author's earlier trial studies of Jeannie Donald and Peter Manuel. The cases are of particular interest to English readers as they pose the question of what the verdict might have been under English law.

N. G.

Books Received:

African Homicide and Suicide. Edited by Paul Bohannan. Princeton: University Press; London: Oxford University Press. 1960. 266 pp. and (index) 4 pp.; (Appendix) 22 pp. 48s. net.

Readers' Digest:

Evidence: The rules of hearsay: 62 *Police College Magazine* 135.

Handwriting: Graphology and the law: 137 *International Crime Police Review* 117.

Practice and procedure: Notice of intended prosecution: 104 *Solicitors' Journal* 397.

Tape recorders: Tape recorders in court: 104 *Solicitors' Journal* 435.

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Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review,* 11 *New Fetter Lane, E.C.4. Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

THE

CRIMINAL LAW
REVIEW

August 1960

The law of murder

The past month has been a remarkable one in the history of the law of murder. In the first few days of the month the House of Lords concluded its hearing of the argument in *D. P. P.* v. *Smith*,[1] and the Court of Criminal Appeal gave its reserved judgment in the Y.W.C.A. hostel case of *Byrne*.[2]

Not since *Beard's* case [3] has the House of Lords had to consider so important an aspect of the law of murder as that which was debated in the *Smith* appeal. One question that was at stake can be put thus: Can a person be convicted of murder if (1) he had no intent to kill and (2) he did not foresee grievous bodily harm although a reasonable man would have foreseen it? Some would say that, once asked, this question answers itself, in view of the gravity of a murder charge. Be that as it may, the very fact that so fundamental a question remained until now undecided by the highest tribunal is a matter for astonishment. It is a fact which reinforces one's satisfaction at the prospect of a future increase in the number of criminal appeals to the House of Lords.

In *Byrne's* case the Court of Criminal Appeal has at last made a close analysis of the diminished responsibility provision (section 2) of the Homicide Act, 1957. The Lord Chief Justice discussed the vital concept of " mental abnormality " in some detail, and gave the phrase a wider interpretation than up to now it has openly been given. Thus the court continues to withdraw from the unsatisfactory position adopted in *R.* v. *Spriggs*.[4] That case seemed to say that the terms of section 2 did not require judicial definition, but presented a pure question of fact for the jury. The recent case suggests that the Court of Criminal Appeal is now prepared to assist fully in solving the difficulties of a very troublesome piece of legislation.

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[1] C. of C.A. decision reported at [1960] 3 W.L.R. 92; [1960] Crim.L.R. 491.

[2] *The Times*, July 5, 1960.

[3] *D. P. P.* v. *Beard* [1920] A.C. 479.

[4] [1958] 1 Q.B. 270; [1958] Crim.C. & C., p. 69.

Committal proceedings—charges kept secret

At Worksop on May 10 the preliminary investigation of charges against ten men was held *in camera*. The names of the men were disclosed, but not their addresses or occupations or the charges against them. The justification offered for the secrecy was, in effect, that the charges were too prejudicial to disclose. The trial has now taken place and it turns out that the men were charged with offences of gross indecency. One cannot help wondering how many people, during the month and a half available for speculation, selected this sort of offence as being, according to their tastes and prejudices, the most prejudicial that they could imagine.

There is no formidable objection to the public's being kept entirely ignorant of a preliminary investigation (many such proceedings are, after all, ignored by the Press for want of news value). The Worksop procedure, however, is alarming in two ways. First, if the name of an accused is to be disclosed, sufficient particulars should be supplied to prevent confusion with another person of the same name. A question in the House of Commons on May 19 revealed that, as a result of the Worksop proceedings, such confusion had affected a prominent citizen of Nottingham. Secondly, secrecy as to the charges must give rise to the danger of unhealthy speculation and rumour. If the fear is that of local prejudice, the remedy in a proper case is the removal of the trial to a different locality.

There is, of course, a case for the non-publication of the evidence taken at committal proceedings. The Tucker Committee on Proceedings before Examining Justices in fact recommended [5] that reports of such proceedings should be restricted to formal matters (until after the dismissal of the charges or the completion of the trial). They also suggested that the power of examining justices to sit *in camera* should be limited to cases where the ends of justice would not otherwise be served. Sitting *in camera* involves exclusion of the Press; but the Committee nowhere appears to contemplate a situation in which the nature of the charges would not be properly disclosed. Nor do any of the existing statutory restrictions of the reporting of judicial proceedings prohibit such disclosure.

Commons debate on homosexuality

The motion [6] moved by Mr. Kenneth Robinson in the House of Commons on June 29 was:

> " That this House calls upon Her Majesty's Government to

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[5] Cmnd. 479; see [1958] Crim.L.R. 647.

[6] H.C. Debates, Vol. 625, cols. 1453 *et seq.*

> take early action upon the recommendations contained in Part Two of the Report of the Wolfenden Committee."

The terms of the motion, which was defeated by 213 votes to 99, are important. The House declined to urge H.M. Government to take *early* action. More than one of the Members who spoke against the motion contemplated that the time would come when homosexual acts committed in private by consenting adults would be rendered no longer an offence. Their feeling, however, was that that time was not yet.

Reform of the law relating to this unhappy topic is, in the end, inevitable. The near-unanimity of the Wolfenden Committee, after careful study, was impressive. One can only hope that the decision to delay the change is a right one. The expediency or otherwise of the delay is a matter that cannot be tested. Nor will we now enter the crowded lists to offer our own view on the wisdom of the Commons' decision.

New psychiatric prison at Grendon

The foundation stone of the first psychiatric prison in the country was laid by Mr. Butler on July 1. No doubt this is merely a foretaste of what is to come and is a further example of the steps forward taken by Mr. Butler and of the recognition of the idea that some criminals though not " certifiably insane or mentally deficient . . . are . . . in various ways mentally abnormal or disturbed and are not easily amenable to treatment by the more ordinary penal methods."

Conferences and congresses

Criminal law and criminology are very much in the news at the moment, by the time this has been published the British Academy of Forensic Sciences will have held their first scientific and general meeting. A number of very well known forensic scientists, lawyers and police surgeons are meeting to discuss education training, research and investigation, in the field of forensic science.

From August 8–20 the United Nations are holding a Congress on the Prevention of Crime and the Treatment of Offenders. The main subjects to be discussed are new forms of juvenile delinquency, the formation of a special police service for the prevention of juvenile delinquency and the prevention of types of criminality resulting from social changes and economic development in less developed countries. Problems relating to prisoners are also to be considered such as their prerelease treatment and after care, assistance to dependants and the integration of prison labour in the national economy.

Indecency with Children Act

One of the important Acts to come into operation in July (July 2) was the Indecency with Children Act. The purpose of this Act is to fill the gap in the law which was shown by *Fairclough* v. *Whipps*,[1] *D. P. P.* v. *Rogers*,[2] and *Williams* v. *Gibbs*.[3] The Act follows the recommendations of the Criminal Law Revision Committee[4] (Chairman, Sellers L.J.) and section 1 (1) is in the terms suggested by that Committee to which we drew attention last year [1959] Crim.L.R. 682.

The Institute of Criminology at Cambridge

The Advisory Council of the New Institute of Criminology at Cambridge, has now been set up. It has been announced that the Bishop of Peterborough (Dr. W. R. Stopford), Sir Charles Cunningham (Home Office), Lord Justice Devlin, Sir Aubrey Lewis (Professor of Psychiatry, London University), Lord Nathan, and Lady Wooton of Abinger, have accepted the invitation of the Committee of Management to serve with them upon it.

The functions of the council are to review the main activities of the Institute, to help in formulating its policies, and promote its development in the light of wider needs as they may arise.

Judicial appointments

Arthur M. Lee, Esq., D.S.C., has been appointed Recorder of the Borough of Penzance.

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[1] [1951] 2 All E.R. 834.
[2] [1953] 1 W.L.R. 1017.
[3] [1958] Crim.C. & C. 138.
[4] Cmnd. 835.

Street Offences Act, 1959[1]

By J. C. Wood, LL.M.,

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The System of Cautions

A significant part of the recent reform of the law relating to prostitution was the introduction of a system by which a first offender is not brought before the courts until she has received two previous cautions. The Wolfenden Committee had recommended the adoption of the system of cautioning which was then used in Edinburgh and Glasgow.[2] The aim of this was clear. It was hoped that in this way two opportunities would be created to divert girls, just starting out on a career of prostitution, from this way of life. This is undoubtedly a desirable object and little fault can be found with the means adopted. They do, however, raise doubts and queries as to the legal implications. It is with these problems that this article is concerned.

The Act

The Act itself is of little help in deciding how such a system fits into the framework of the law. Cautions are only mentioned obliquely. Section 2 (1) begins: " Where a woman is cautioned by a constable," and then provides for an application to a magistrate's court for an order that no entry of the caution be made or retained in any police record. This indirect reference to cautions and police records was inserted into the Bill as originally proposed at the Report Stage, and there is no other indication that a system of cautioning and recording cautions has been established.

At this stage, it should also be noted that the Act in section 1 regulates common prostitutes. Subsection (1) reads: " It shall be an offence for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution." There is no definition of the term " common prostitute " in the Act, or in any other Act. The phrase, since it implies that activity prior to the acts charged is relevant, raises the problem of admissible evidence in general, and the system of cautions in particular.

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[1] 7 & 8 Eliz. 2, c. 57.

[2] Cmnd. 247, para. 270.

The debates

The Parliamentary debates on the Second Reading[3] and the Report Stage[4] disclose in full both the aims of the Government and its reasons for the structure of the Act. Many of the legal difficulties were also raised by the opponents of the Bill.

The system of cautions was described by the Attorney-General. "If a woman is seen loitering or soliciting for the purposes of prostitution by one police officer and she is not known to him as a common prostitute who has had convictions, he will obtain the assistance of another police officer. They will then both watch the woman and only if they are satisfied . . . will they caution her. It is intended that they shall ask whether she will allow her name and address to be given to a moral welfare agency. The caution, if it is given, will be recorded at the police station, and, in London, registered in a central registry. It is only after a person has been cautioned twice that a charge under the Bill will be presented."[5] The Home Secretary also explained that this system would be established by instructions from himself to the Metropolitan Police and by a letter of advice to provincial Chief Constables. It is understood that this is what has been done and that it can be assumed that the instructions follow the system expounded in the debates.

There was strong pressure to include the system of cautions within the proposed legislation. Mr. Paget proposed an amendment at the Report Stage which would have had this effect.[6] His clause read: "No common prostitute shall be prosecuted for loitering or soliciting for the purpose of prostitution unless she has within the previous two years (a) been convicted of committing an offence as a common prostitute or (b) received two cautions." This move was defeated. The Government's objection to the inclusion of the scheme of cautions in the legislation was fundamentally that they desired to keep separate the attempt at reformation and the criminal offence. There were also two detailed criticisms of inclusion. If the Act were specifically to give a policeman the power to caution this power must be backed up by the power of arrest in face of a refusal to provide name and address. It was considered to be a serious breach of principle to give a power of arrest where the arrest would clearly from the outset not be followed by a criminal charge. Secondly the Home Secretary said that if the offence were to require two prior cautions as a constituent part the accused would always be prejudiced by evidence of similar conduct on those other occasions when the cautions were administered.

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[3] *Hansard*, vol. 598, col. 1267.

[4] *Hansard*, vol. 604, col. 401.

[5] *Ibid.* col. 401.

[6] *Ibid.* col. 414.

The validity of the desire to keep reformatory and criminal provisions so far apart that they cannot be contained in the same statute seems to be questionable. It is by no means clear that the more detailed objections have been wholly avoided. The opponents of the Bill raised in addition other criticisms of substance. The use of the term " common prostitute " was attacked, as was the institution of a permanent register. Doubt was expressed as to the type of evidence which would be used to prove the offence of soliciting and the powers of the police were questioned. These criticisms fall into two groups: those concerned with evidence and those relating to police powers.

1. *Evidence*

The term common prostitute is well established.[7] It was considered by the Court of Criminal Appeal in *R.* v. *de Munck* [8] in which case Darling J. said, delivering the judgment of the court [9]: " The term 'common prostitute' in the statute [10] is not limited so as to mean only one who permits acts of lewdness with all and sundry, or with such as have her, when such acts are in the nature of ordinary sexual connection. We are of the opinion that prostitution is proved if it be shown that a woman offers her body commonly for lewdness for payment in return." The Wolfenden Committee gave a suggested definition: " any person who in any public place habitually or persistently loiters or importunes passengers for the purposes of prostitution." [11] The Government, however, did not feel that a definition need be included in the Act.

It will be observed that any definition must involve the idea of a series of acts and this raises the problem whether previous convictions or cautions are admissible. There is no clear decision, but it would appear that previous convictions are inadmissible. The general rule of exclusion of previous convictions is a strict one [12] and the only likely exception under which they might be admitted is that the previous convictions are part of the offence. Those other crimes in which previous convictions are essential or can be used, have clear statutory provision for admissibility. For example, section 43 (1) (*b*) of the Larceny Act, 1916, provides that in charges of receiving, for the purpose of proving guilty knowledge conviction of offences involving fraud or dishonesty during the preceding five years may be given in evidence. Notice of the intention to prove these convictions is to be given to the accused in writing.

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[7] *e.g.*, s. 3, Vagrancy Act, 1834; s. 2 (2), Criminal Law Amendment Act, 1885.

[8] [1918] 1 K.B. 635.

[9] Darling, Lord Coleridge and Slater JJ.

[10] s. 2 (2), Criminal Law Amendment Act, 1885.

[11] para. 260.

[12] *R.* v. *Harris* [1951] 1 K.B. 107.

The example closest to the position under discussion occurs in the Vagrancy Act, 1824. The structure here is notable. Section 4 provides that " every person committing any of the offences hereinbefore mentioned, after having been convicted as an idle and disorderly person . . . shall be deemed a rogue and vagabond." Section 5 provides that " . . . every person committing any offence against this Act which shall subject him or her to be dealt with as a rogue and vagabond, such person having been at some former time adjudged so to be and duly convicted thereof . . . shall be deemed an incorrigible rogue." It will be observed that the passage through " three categories of knavery "[13] from idle and disorderly person[14] to rogue and vagabond[15] and then to incorrigible rogue[16] depends upon the establishment of earlier convictions. All these examples have express indication that the previous conviction can be used. One part of section 4, however, proves that " every suspected person or reputed thief, frequenting any river, canal, or navigable stream, dock or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any street with intent to commit a felony shall be deemed a rogue and vagabond." The phrases " reputed thief " and " suspected person " have great similarity to the term " common prostitute." The courts have often considered the exact meaning of the term " suspected person." The cases are far from clear, but they may well be a guide to the type of evidence required to establish " common prostitute." The leading cases are *Hartley* v. *Elnore*[17] and *Ledwith* v. *Roberts*.[18] In the first of these the accused was seen, over a period of forty minutes, tapping pockets. He was arrested as a suspected person. There was no other evidence of his character but the court held that there was opportunity during the forty minutes for the accused to become a suspected person. *Ledwith* v. *Roberts*[18] was a civil case in which the lawfulness of an arrest was considered. The Vagrancy Act, 1824, only gives power to arrest suspected persons. It was clearly expressed by the Court of Appeal that there must be " previous " or " antecedent " conduct before a man could be arrested as a suspected person. Two of the judges, Greer and Scott L.JJ. threw strong doubts upon the decision in *Hartley* v. *Elnore*. They felt that there was not, on the facts of the case, evidence of previous or antecedent conduct. The basic rule was not, however, affected. Doubt was merely cast upon the point where conduct can be termed previous. Three more recent cases have supported the decision in *Hartley* v. *Elnore*. In *Rawlings* v. *Smith* [19] where the accused had been observed trying a series of car doors, the Chief Metropolitan Magistrate followed *Ledwith* v. *Roberts* and ruled that there was no previous conduct. Lord Hewart C.J.[20] in the Divisional Court made it clear that he did not consider that the earlier case of *Hartley* v. *Elnore* had been overruled, and as long as there was an observed antecedent act the accused could be regarded as a suspected person. At this stage, it would seem that the basic test was the same: was there a previous act, unconnected with the act for which the accused was arrested? The difference of opinion was whether the earlier act could be close in time and observed in the same period of surveillance. *Cohen* v. *Black* [21] lends support to the view that it could. The case is somewhat unsatisfactory and the judgments,[22] apart from a detailed recital of the facts by Charles J., are chiefly preoccupied with a discussion of earlier cases. The accused was reported to the police as being suspected by the complainant of selling stolen goods. Following up this report, the police watched the accused and his confederates, heard several statements that indicated that in fact they were trying to rob the buyer of the purchase price and arrested the accused. The case was decided on the ground that the evidence of several acts was sufficient to establish the accused as a suspected person. The weakness of the case is that the acts all pointed towards the crime charged and it is only on the point that an earlier supposition had favoured a different crime that the case may be supported. Even that support is open to considerable criticism, for the first type of crime, selling stolen goods, may have been merely a misreading of the situation. Finally in *R.* v. *Fairbairn* [23] the cases were again discussed and Lord Goddard C.J., whilst regarding *Ledwith* v. *Roberts* as the leading case, said that he considered *Hartley* v. *Elnore* to be still good law. A case illustrating facts where this test does not apply is *Pyburn* v. *Hudson*[24] where the two acts, both giving rise to suspicion of an intended breaking into premises, were seen at the back and then at the front of the same premises during police surveillance. The Divisional Court held that that was not enough to constitute previous conduct. It follows that it may be said that:

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[13] *Per* Greene L.J., *Ledwith* v. *Roberts* [1937] 1 K.B. 232 at p. 263.

[14] s. 3, Vagrancy Act, 1824.

[15] s. 4.

[16] s. 5.

[17] (1917) 81 J.P. 201; 117 L.T. 304.

[18] [1937] 1 K.B. 232.

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[19] [1938] 1 K.B. 675.
[20] Branson and Porter JJ. agreed.
[21] [1942] 2 All E.R. 299.
[22] Charles, Lewis and Oliver JJ.
[23] [1949] 2 K.B. 690.

1. there must be a previous or antecedent act to arouse suspicion;
2. there must be an act relating to another suspected attempt at crime;
3. there need be no great time lapse between the previous act and the act for which the accused was arrested. This assumes that the test in *Ledwith* v. *Roberts*, which seemed to require two periods of surveillance, can no longer be accepted.

The use of previous convictions has also been discussed in two cases. In *R.* v. *Fairbairn*[23] it was held that previous convictions could be used as evidence that the arrested person was a "suspected person." The other case, *R.* v. *Clarke*,[25] is a remarkable decision. The arresting policeman was unaware that previous convictions were recorded against the person he arrested as a suspected person. Nevertheless, Humphries J. held that his action could be justified *ex post facto*, for he said, "no case was brought to our attention in which any judge has expressed any view as to the necessity for knowledge on the part of the police officers of the past character of the accused person."[26]

There has been no case applying this type of reasoning to "common prostitute" and, as the rule is against the use of similar facts to prove a present charge, it must be presumed that there is no power to use. There is no reason, however, why the courts, if they so desire, cannot use the same type of reasoning as has been done with "suspected person" and so allow the use, to prove "common prostitute" which is an essential feature of the crime, of previous convictions or cautions.

Added to the uncertainty is a very valid point made in the debates. A woman charged, who finds that earlier watching on other occasions is used in evidence may not, because of her unawareness at the time, be able to bring evidence in rebuttal. If previous convictions and cautions are used, these will relate to occasions upon which the alleged offence was brought to her notice immediately after the occurrence. Her chance of establishing innocence in the appropriate cases will be considerably improved.[27] It seems, however, that the evidence used will follow the familiar pattern of observations kept on other occasions.

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[24] [1950] 1 All E.R. 1006.
[25] [1950] 1 K.B. 523.
[26] *Ibid.* at p. 530.

2. *Police procedure and practice*

The law is silent as to police cautions. Standard works of reference[28] use the word caution only to cover the action taken by a policeman to warn a person whom he is interviewing of the position if he makes a statement. There is no discussion of the practice of the police substituting a warning for prosecution. This is, however, a well-known and widely used practice most especially in relation to offences by juveniles and minor motoring offences. The growth of this practice and its obvious usefulness has, as far as can be discovered, been unregulated by law.

It raises two problems, both springing from the police duty to prosecute. If a policy of caution in certain cases is adopted, the individual may find himself accused of crime yet unable to clear his name. If, for example, a lorry driver is cautioned for speeding and his employer hears of this, the driver, although he would normally prefer a caution to a prosecution would, if he felt he had a good defence, be better served by a prosecution. Secondly, and this point was raised in the debates,[29] if the policy of the police force is not to prosecute, in theory at least any constable is entitled to ignore this and to prosecute, himself. Although the possibility of such a prosecution is remote, it is surely better that it should be, by law, impossible. This is a point of theoretical rather than practical importance and these remarks in general are in no way intended to be a criticism of police forces. There can be no suggestion that it is improper not to prosecute, for a discretion can be implied from the general rules of police powers and duties. The police have a duty to " preserve the King's Peace and with that object to keep watch and ward in their several districts and to bring criminals to justice,"[30] but there would seem to be no rule that enjoins the prosecution of all persons against whom it is felt that a prima facie case is available. The only point being made here is that the power to caution, or strictly, the practice of cautions, is not legally regulated and may, therefore, give rise to a very wide variation in practice from area to area. It follows that where a procedure is to be laid down as part of the national way of treating particular offenders it is desirable that the procedure should be plain to all so as to bring certainty to an otherwise unregulated section of procedure.

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[27] *Cf.* s. 22, Road Traffic Act, 1930, where this objection is recognised in a different context.

[28] Archbold, 1118; Stone, 353–354, 2639–2641, 2657.

[29] Mr. Silverman, vol. 598, col. 1275.

[30] 2nd ed., Halsbury, vol. 25, p. 321—a statement not to be found in the recently published 3rd edition which contains no mention of a duty to prosecute at all.

The register which will be kept by the police is a potentially dangerous document as the House of Commons recognised by the insistence that a right to appeal against inclusion should be available. There is no indication as to how long the records will be kept, and there would appear to be an excellent case for the removal of a name if there is no second caution or conviction within a set period of years. Fears were expressed in the House of Commons that the record would be a permanent disability to a woman concerned.[31] This is clearly undesirable, and in respect of the designation "suspected person" Lord Hewart C.J. in *Rawlings* v. *Smith*[32] quoted with approval the dicta of the Chief Magistrate of Bow Street who said, "It seems obvious that a man who becomes a 'suspected person' by reason of conviction for dishonesty cannot remain forever in the category." There seems to be strong reasons, by analogy why the designation "common prostitute" or entry in the register should not be removed where a certain time has lapsed since the last conviction or entry.

Finally, the Act gives the policeman power of arrest.[33] There would seem to be no objection to a policeman unsure of the previous record of a suspected "common prostitute" arresting her and releasing her at the station with a caution when it is found that she has no previous conviction or entry in the register. Thus the position feared by the Government, of arrest merely to caution could, under the existing law, become the practice, although it is doubtful whether that will be done.

Conclusions

The Street Offences Act is yet another unfortunate example of a criminal law statute falling far short of the standard of precision and certainty which is of paramount importance in this field. The areas covered by it are particularly uncertain as the law now stands and the opportunity was present to evolve a model of twentieth century legislation which dealt systematically with the problems, peculiar to this type of offence.

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[31] *e.g.*, Mrs. Jeger, vol. 604, col. 1323.
[32] [1938] 1 K.B. 675.
[33] s. 1 (3).

The idea that the reformatory aims should be hidden and that it was preferable to rely upon instructions to Chiefs of Police merely adds to the uncertainty of the law. Home Office instructions are not available to the general public and it is to be regretted that it is impossible to know how the law works, or is meant to work, from available sources.[34] There can be no valid reason why the system of cautions could not have been written into the Act, and the two functions of reformation and punishment plainly separated.

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[34] The article is based on the assumption that the Home Office Circular issued to provincial forces is as was indicated by the Attorney-General and the Home Secretary in the debates.

Intent to Defraud Reconsidered

By G. H. L. Fridman, M.A., B.C.L., LL.M., *Lecturer in Law, University of Sheffield.*

Two years ago, in the pages of this review,[1] the present writer discussed a series of cases, including *R.* v. *Bassey,*[2] in which courts had considered, in differing statutory contexts, the meaning of the expression " intent to defraud." In that article it was suggested that the better view to adopt was to the effect that the intent required was an intent to cause economic loss, however infinitesimal, to the person deceived: which would mean that deceiving someone into acting to his detriment, without causing him economic loss, would not be sufficient in cases requiring the intent to defraud another. In 1959, in the case of *Woodgate* v. *R.*[3] this matter came before the Court of Appeal for Eastern Africa. This year the Court of Criminal Appeal in the case of *R.* v. *Welham* [4] and the House of Lords in the subsequent appeal [5] upheld the decision in *Bassey* and the view which that case took of the phrase " intent to defraud." It is proposed therefore in this article to examine these cases, and to see whether in the light of what is said, whether any reform of the law is desirable.

Woodgate v. R.: the facts

The African case was an appeal from a decision of the High Court of Uganda dismissing an appeal from a conviction in the Resident Magistrate's Court on three counts of fraudulent false accounting by making false entries contrary to section 305 of the Penal Code of Uganda. The relevant passages of this provision read thus:

> "Any person who, being a clerk or servant . . . does any of the acts following with intent to defraud, that is to say
>
> (a) . . . falsifies any . . . document, valuable security or account which belongs to or is in the possession of his employer . . . ; or

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[1] *Intent to Defraud* [1958] Crim.L.R. 503.

[2] (1931) 22 Cr.App.R. 160.

[3] (1959) 43 Cr.App.R. 40. For the transcript of this case I am very much indebted to the Registrar of the High Court of Uganda who also took the trouble of bringing my earlier article to the notice of counsel in the case.

[4] [1960] Crim.L.R. 423. See also *R.* v. *Garland* [1960] Crim.L.R. 129 discussed later in this article.

[5] *Sub nom. Welham* v. *D. P. P.* [1960] Crim.L.R. 423.

> (b) makes . . . any false entry in any such book, document or account; is guilty of a felony and is liable to imprisonment for seven years."

The appellant managed a club in Uganda for a period of three years. During that time he kept under his control the club's stocks of liquor, mineral water and cigarettes. He had the key of the store in which these things were kept in safe custody. The barman was responsible to him. He had to keep books of account in respect of stocks of liquor and cigarettes purchased for the club, and daily cash sheets in respect of the bar's takings. He also had to take stock of the contents of the bar and the store as at July 1 (the start of the club's financial year) in each year. The results of this stocktaking had to be entered in an annual bar account which contained a quantitative list of stock held on July 1.

The appellant in fact entered into the bar account for 1956-57, thirty-two items of stock received by the club *after* July 1, 1957, thereby overrating by a large amount the stock actually held by the club at that date. Although the appellant tried to argue that this had been done by inadvertence, it was held that the false entries relating to these thirty-two items of stock were made by him deliberately and with knowledge of their falsity.

Moreover, the appellant made false entries in the bar account sheets for August and October 1957 which purported to show that the total of bar sales for these months were more than they actually had been. Here again it was held that the appellant knew that the entries were false.

However, it was not enough, to convict the appellant of making false entries as charged, to show that the entries he had made were false to his knowledge. It was necessary to show that these entries had been made by the appellant with the intent to defraud the committee of the club.

The intent

It was found that in making the false entries in the bar account for 1956-57 the appellant wished to show that a higher profit had been made than had actually been made. It was not the appellant's object in making such entries to avoid being dismissed as a result of disclosures which correct accounting would have shown and so to be paid further wages.[6] For his contract with the club was due to expire at the end of 1957, and did expire at that date: and there was no evidence that the appellant sought the renewal of his contract. As for the bar account sheets for August and October 1957, there was no direct evidence that the appellant had made false entries to cover up the misappropriation or conversion of money received by him as manager. Yet he had deliberately made the false entries.

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[6] Contrast *R.* v. *Wines* [1954] 1 W.L.R. 64.

Thus, so far as the bar account for 1956-57 was concerned, there was no evidence of any intent on the part of the appellant to *cause* economic loss to the club committee. So far as the false entries were concerned, there was no evidence of any intent on the part of the appellant to *conceal* economic loss caused in the past to the committee with the result that they would be unable to pursue any possible remedies against the appellant and thus make good such loss. On the argument put forward in the earlier article, therefore, it would seem that the appellant was improperly convicted of all the offences with which he was charged.

A different conclusion was reached by the Court of Appeal for Eastern Africa. The approach of the court was based on the proposition that to be defrauded a person must *either* have been deprived of something having some economic value (however small) *or* he must have been induced to act or to remain inactive to his own injury, not necessarily an economic injury.[7] The intent to defraud, therefore, involved the intent to cause economic loss or to produce a course of action (or inactivity) resulting in injury to another. In the case of Woodgate, as already seen, the first could not be shown. However, the question which then arose was whether any intent to produce an injurious course of action or injurious inactivity had been proved.

In respect of the bar account for 1956-57 the Court of Appeal concluded that no such intent had been proved. All he had done had been designed to show a higher bar profit than had actually been made. Such a deception could not be said to be of the kind that would induce the committee to act or refrain from acting in a manner resulting in their injury. On the other hand, the false entries in the bar accounts for August and October 1957 did show an intent to defraud, because the natural and probable consequence of the deliberate insertion of false figures for the actual cash receipts was that the club committee would not realise that there were substantial discrepancies between the actual bar receipts and the expected bar receipts. The committee were intended to be deceived and to be deprived of information which it was the appellant's duty to supply and which in the natural course of things would have led to an investigation into the reasons for the discrepancies and to steps being taken to remedy a state of affairs detrimental to the club.

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[7] The cases relied upon were *Re London and Globe Finance Corporation Ltd.* [1903] 1 Ch. 728; *R.* v. *Bassey* (1931) 22 Cr.App.R. 160; *R.* v. *Kritz* (1950) 33 Cr.App.R. 169; *R.* v. *Wines* [1954] 1 W.L.R. 64; *R.* v. *Potter* [1958] 1 W.L.R. 638.

In the event, therefore, the necessary intent was not proved on one count, but was in respect of the others: one conviction was therefore quashed and the others upheld.

Thus the appellant was convicted of two offences involving dishonesty (*i.e.*, the intent to defraud), when there was no evidence that the shortage in the bar receipts was caused by criminal activities on his part. In other words, it was not proved that the appellant had any intent to cause any economic loss to the club: it was only inferred that he intended the club to be misled about something which may not have been his fault at all. However morally wrong this may have been, however much such conduct might have justified dismissal and an action for breach of contract on the ground of negligent performance of the appellant's duties as manager of the club, it is difficult to accept the decision that his conduct deserved to be considered fraudulent and therefore criminal. Yet this conclusion resulted from the acceptance of the proposition that the intent to produce conduct or inactivity that is injurious in any way to the person acting or refraining from acting as a result of the accused's falseness comes within the scope of the intent to defraud.

What kind of injury is covered by this proposition? Does it include physical injury: *e.g.*, if as a result of the accused's false statement someone is induced, or is intended to be induced, to go somewhere that is dangerous and thereby suffers, or is meant to suffer, some physical harm? Does it include social injury, or personal injury not amounting to physical harm: *e.g.*, doing something that results in ostracism or disapproval from society, marrying someone who turns out to be unsuitable or incompatible? Seen in the context of the statutes in which the intent to defraud is made an ingredient of certain crimes [8] such possible results seem incongruous and irrelevant [8a]. Yet the very distance of such results from the wrongs which the statutes appear to be designed to punish indicates that the kind of injury or detriment intended to be prevented or punished ought to be narrowly defined. Indeed an examination of the statutory provisions indicate that economic loss or injury is contemplated by the idea of "defrauding." Such marginal cases as *Bassey*[9] and *Potter*[10] (in which in any event it is possible to find economic loss or injury[11]) seem to come more within the scope of the intent to *deceive* which is all that need to be shown in the case of the forgery of *public* documents,[12] than within the scope of the intent to defraud. If the language of the statute is not sufficiently wide to cover such cases then it would appear more satisfactory to amend the statute than to strain the meaning and application of the expression "intent to defraud." This suggestion brings us to the recent decision of the Court of Criminal Appeal upheld by the House of Lords.

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[8] For some references see [1958] Crim.L.R. 503, note 2.

[8a] *Cf.* the remarks of Lord Radcliffe in *Welham* v. *D. P. P.* [1960] 1 All E.R. 805 at pp. 810–811.

R. v. Welham: Welham v. D. P. P.

Here the appellant was charged with other men on several counts, the relevant one (on which he was convicted) being uttering forged documents with intent to defraud. The documents in question were a hire-purchase proposal form and hire purchase agreement and five credit-sale agreements. The appellant's defence was that he had no intent to defraud either the finance companies who advanced money on the agreement or anybody else.[13] According to him the false transactions were designed to evade current credit restrictions. The finance companies had money to lend, but could not do so unless they had documents which would make it appear to anyone inspecting their records that they were advancing money in the way of their business as finance companies. The appellant's story was that he thought he was being a party to the deceiving of the Capital Issues Committee; but, as the Court of Criminal Appeal pointed out, the person who might inspect the companies' books would be an inspector of the Board of Trade. However, this was immaterial, since, as long as there was an intent to defraud someone, it did not matter who would be defrauded. The real question was whether this admission by the appellant, of the deception that was practised by the uttering of these forged documents, amounted to an admission of an intent to defraud, such as would support his conviction; or merely proved an intention to deceive, in which event the direction of the Common Serjeant at the trial was wrong.

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[9] (1931) 22 Cr.App.R. 160.

[10] [1958] 1 W.L.R. 638.

[11] The report of *Bassey* in 47 T.L.R. 222 shows that economic loss was caused since on the faith of the forged certificate the accused was admitted to the Inner Temple on payment of a fee £100 less than he would otherwise have been charged.

[12] Forgery Act, 1913, s. 4 (2).

[13] This story was accepted by the jury who acquitted the defendant on the count of conspiring with other defendants to cheat and defraud the finance companies by the forged documents: [1960] 1 All E.R. 260 at pp. 262–263.

The learned trial judge had directed the jury to the effect that the intention to defraud was proved by the admission by the appellant that he intended to deceive the Capital Issues Committee into not preventing something which it was their duty to prevent, namely, the advancing of large sums of money over a certain limit which was provided by law at the time. There was no suggestion of an intention to defraud by depriving anybody of something having economic value. The intention which was alleged was to induce the Capital Issues Committee to act to its injury in failing to fulfil its duty as a result of a deception.

Thus the true meaning and scope of the expression "intent to defraud" was directly raised for determination by a full court of the Court of Criminal Appeal and by the House of Lords. The conclusion in both courts was that intent to defraud was not confined to the narrow meaning of intent to cause an economic loss, but included the intent to cause the person deceived to act to his real detriment, by depriving him of a right or inducing him to do something contrary to what it would have been his duty to do, had he not been deceived. In the Court of Criminal Appeal this was based on three arguments.

First, that to conclude otherwise would be to hold that *R.* v. *Bassey* had been wrongly decided. Secondly, that the suggestion that the narrow view of intent to defraud was correct was modern, so far as text books were concerned: in that older editions and books contained no such restrictions. Moreover, nineteenth-century cases on forgery, before the Forgery Act, 1913, had not made such a restriction on the meaning of intent to defraud, but had considered it as covering the intent to cause someone to act to his detriment otherwise than by involving him in economic loss. Thirdly, that the wider meaning of intent to defraud did not have the result, as had been argued, that no distinction could then be brought between an intent to defraud and an intent to deceive.

In the House of Lords the arguments in favour of this meaning of the phrase "intent to defraud" were very much the same.

The court's reasons

According to the court in *Welham*, the decision in *Bassey*[14] was based entirely on the argument that Bassey intended to induce the Benchers of the Inner Temple to act to their injury in admitting as a student a person whom, if they had known the true facts, it was not only their right but also their duty to exclude.[15] The correctness of this view was doubted by Lord Goddard C.J. in a dictum in the course of the Court of Criminal Appeal's judgment in *R.* v. *Owen*,[16] but apparently approved in a dictum by Lord Tucker, when that case reached the House of Lords.[17] The point which gave rise to these conflicting statements was whether a conviction for conspiracy to cheat and defraud would be possible where the conspiracy was designed to get a government department to act to its detriment by issuing an export licence or a certificate which enabled something to be done which the department was obliged to prevent. Lord Goddard seemed to consider that this was doubtful because the department had not been deprived of anything: Lord Tucker felt no doubt at all that the offence would have been committed.

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[14] (1931) 22 Cr.App.R. 160, at p. 162, *per* Swift J. But if Bassey had had £100 he would not have had to forge the documents in question in order

This the Court of Criminal Appeal took as a tacit approval of the reasoning and decision in *Bassey*. Yet, as the Court of Appeal for Eastern Africa pointed out in *Woodgate*, one report of the facts in *Bassey* would suggest that the decision could be based on economic loss, namely that by reason of the forged document Bassey had been charged £100 less by the Inn than he would have been had the truth been known.[18] Moreover, it could be argued in respect of the dicta in *Owen* that the granting of a licence was the giving of a piece of paper which was of economic value. The first point was not mentioned by the court in *Welham*. The second was dismissed by that court as a highly artificial ground, since "it would have been absurd if a different conclusion were necessitated had the licence granted been an oral licence." [19]

Surely, the answer to this is that if the facts were different, *i.e.*, if the licence were oral, then a *different* charge would have to be found. English criminal law is very familiar with the need to frame a different charge on a slight change of facts, particularly where offences involving dishonesty are concerned. It is strange, indeed,

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to be entitled to admission to the Inn: the report in 47 T.L.R. 222 makes this clear.

[15] (1957) 41 Cr.App.R. 11 at p. 15.

[16] *Board of Trade* v. *Owen* (1957) 41 Cr.App.R. 11 at p. 40. This—was approved by the House of Lords in *Welham* v. *D. P. P.* [1960] 1 All E.R. 805 at pp. 811, 816; 2 W.L.R. 669.

[17] A point which I unfortunately did not bring out in my earlier article.

[18] [1960] 1 All E.R. 260 at p. 265. See also the comment by Professor Smith on *R.* v. *Garland* [1960] Crim.L.R. 129: discussed later in this article.

[19] *Cf.* the construction of the Official Secrets Act, in *R.* v. *Oakes* [1959] 2 Q.B. 350.

to read criticisms of "artificial grounds" in the light of the history of English criminal law, which has always been careful not to let the scope of offences become so great that the nature of any offence is nebulous and its distinction from other offences so ill-defined that any set of facts can be made to fit under any of a number of similar, but technically different, offences. Possibly the more recent trend of criminal law has been the opposite way: towards reducing the technicalities of the law and the definition of certain crimes.[20] However, it is respectfully suggested that too elastic an application or definition of crimes by the courts can lead to distortion of the law and injustice. If offences are needed to cover gaps in the law then it is up to Parliament to create them.[21]

As far as the first argument is concerned, therefore, it is suggested that the decision in *Bassey* need not have been overruled, since the case could have been regarded as an instance of economic loss. On the other hand the "principle" which the case has been said to expound could legitimately have been criticised and dissented from, unless there were independent arguments in favour of that principle. The first of these suggested independent arguments, that otherwise artificial distinctions might be drawn, is submitted to be incongruous and unjustified considered in relation to the general tenor of the criminal law.

The second of these independent arguments, as they are here being called, was that the older textbooks and the older cases showed no such limitation in the meaning of intent to defraud as are put upon that expression by the idea of economic loss. The opinion of such authors as Kenny and Stephen is naturally entitled to the greatest respect. Yet Kenny's views have been specifically rejected by his latest editor Mr. Turner and by Dr. Glanville Williams. Moreover, although the Court of Criminal Appeal in *Welham* argue that Stephen's reference[22] to the element of "injury" in defrauding does not indicate that it must take the form of economic loss, Stephen does not explain what "injury" means. On the other hand, since the offences in which the intent to defraud is an ingredient are what might be called "economic offences," offences against property, it might be thought that, at least where such offences were concerned, Stephen had in mind the kind of "injury" normally to be expected to result from such offences, namely economic loss.[23] As for Blackstone and East it is suggested that since, when these authors wrote, some doubt surrounded aspects of the laws of forgery their words are not to be considered authoritative in 1960. In view of these doubts it is suggested that too great a reliance should not have been placed by modern courts on old text-writers.

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[20] *Cf. R.* v. *Newland* [1954] 1 Q.B. 158 at pp. 165–168. Contrast the comments of Lord Radcliffe on this very point in *Welham* v. *D. P. P.* [1960] 1 All E.R. 805 at p. 810.

[21] *History of the Criminal Law of England,* ii at p. 121.

[22] Kenny and Stephen were relied upon by the Court of Criminal Appeal, but not by the House of Lords who went back first to Blackstone and East.

As for the older cases, from which dicta were cited in the Court of Criminal Appeal, *R.* v. *Toshack*[24] and *R.* v. *Hodgson*,[25] it is suggested that they are not necessarily conclusive on this matter. The history of the crime of forgery at common law shows that at this period (mid-nineteenth century) the courts were still in the midst of the eighteenth-century doubts as to what constituted forgery of a non-public document.[26] In other cases of this time[27] doubt was expressed as to whether there could be forgery without the intent to deprive the person, to whom the forged documents were uttered, of something, *i.e.*, something of economic value. In *Toshack* the importance of the duty to be discharged by Trinity House was stressed: but, it is suggested that the indictment was only good because it alleged economic loss to the Corporation of Trinity House. The "duty" aspect of the case was important because it stressed the importance of and reason for, punishing the crime, rather than as a technical ground for holding that a crime had been committed. *Hodgson* was, as the court admitted, a case of intending to deceive by forging a diploma of the College of Surgeons which was hanging in a sitting-room. It was held that forgery had not been committed, because there was no intent to defraud, since there was only intent to induce those that might come to see him that the diploma was genuine. Could not the same be said of the forged documents used to obtain a master's certificate in *Toshack*? In *Hodgson* the situation was regarded as analogous. Erle J. could not see "any great distinction between the degree of loss of life at sea through the employment of an incompetent pilot and the danger of loss of life on land through the employment of an incompetent surgeon."[27a] Yet there was no conviction in *Hodgson*; and the difference, it is suggested, was because in *Toshack* a certificate was obtained through forgery, and was worth money, but in *Hodgson* nothing of value had been obtained or was intended to be obtained by the forged diploma.[28]

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[23] *Cf.* Stephen's statement that in relation to larceny, the intent to defraud must be "intent to deceive in such manner as to expose any person to loss or risk of loss": *Ibid.* iii, p. 187.

[24] (1849) 4 Cox.C.C. 38.

[25] (1856) Dears. & B. 3.

[26] *Russell on Crime* (11th ed. 1958), pp. 1421–22.

[27] *R.* v. *Sharman* (1854) 18 Jur. 257: *R.* v. *Moah* (1858) Dears. & B. 550.

[27a] (1856) Dears. & B. 3 at p. 5.

These cases and several others [29] were strongly relied upon by Lords Radcliffe and Denning in the House of Lords in support of the view that the phrase "with intent to defraud" was never conferred to the causing of economic loss. Yet, for the reasons already suggested, it is submitted that too great reliance should not be placed upon these older authorities, even though they may be looked at if the Forgery Act, 1913, is of doubtful import: they should not be regarded as conclusive of the dispute as to the *modern* meaning and application of this phrase.

The third independent argument, it is suggested, is the weakest, as the Court of Criminal Appeal in *Welham* (though not the House of Lords) seemed to accept. Although it is true that intent to deceive and intent to defraud may possibly still be distinguished if the view adopted in *Welham* is correct,[30] it is suggested that any distinction will be difficult. It will still be clear in cases like *Hodgson*, but it will not be so clear in cases like *Woodgate*. Yet there must be some point in the distinction: for it has been drawn in cases and in statutes such as the Forgery Act, 1913.

It is submitted, therefore, that the reasoning and conclusions in *Welham* were unfortunate. In that particular case, it is suggested, there was clearly an intent to deceive whoever inspected the books of the finance companies. But there was no intent to defraud on the approach suggested by the present writer as the most reasonable, unless it could be said that to intend to benefit oneself by forgery is sufficient if it involves detriment (not necessarily economic detriment) to another who is induced to rely on the forgery. For the appellant intended to benefit by his forgery by getting further loans despite credit restrictions.

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[28] Had the diploma been put in a surgery, would this have been forgery? It is submitted that it could have been, because then the intention would have been to obtain payment by inducing people to believe the forger was a doctor who could be consulted.

[29] *R.* v. *Harris* (1833) 1 Mood.C.C. 393; *R.* v. *Sharman* (above); *R.* v. *Moah* (above); *R.* v. *Martin* (1836) 1 Mood.C.C. 483; *R.* v. *Fawcett* (1793) 2 East P.C. 862.

[30] This was the opinion of Lords Radcliffe and Denning in the House of Lords: [1960] 1 All E.R. 805 at pp. 811, 815. Lord Radcliffe was prepared to concede that though possible the distinction was difficult. Lord Denning was even more sanguine, but it is respectfully suggested, that his distinction takes us back to the language of Buckley J. in *Re London and Globe Finance Corpn., Ltd.* [1903] 1 Ch. 728 at p. 732, which previously caused difficulty: see the earlier article by the present author.

This brings us to a recent discussion in the pages of this Review by Professor Smith,[31] commenting on the case of *Garland*, decided at Pontefract Quarter Sessions.

The idea of benefit

In *Garland* the defendant, a police officer, forged a form to show falsely that he had a valid driving licence when all the time he was a learner-driver with a provisional licence. His purpose was to conceal the fact that he had been guilty while off-duty of motoring offences. If the offences had not been concealed his chances of promotion would probably have been affected, though he would not have been dismissed. It was held that the defendant was guilty of the offence since, following *Bassey*, he had the intent to defraud, because he caused the police to refrain from performing their duty under the Road Traffic Acts: therefore he was inducing them to act to their injury and to the injury of the public.

Professor Smith, discussing this case, agrees that the principle adopted in *Bassey* (and now in *Welham*) would virtually eliminate the distinction between defrauding and deceiving. But he considers the notion of economic loss unsatisfactory for two reasons.

First, because the real point in cases like *Toshack*, *Bassey* and *Potter*[32] is that the accused by forgery has acquired certain rights: his liability should not depend on whether these rights were or were not evidenced by a piece of paper of infinitesimal value.[33] This point was also raised in *Welham* and has already been discussed above. It is therefore unnecessary to reply to it again.

Secondly, because the test of economic loss would lead to the accused's guilt being dependent not on whether a piece of paper is actually supplied, but on whether the accused knows or believes that one will be supplied. Professor Smith gives as his example the problem of a man applying for membership of a club by a forgery. On the economic loss test his guilt of forgery would depend on whether he knows or believes that the club issues a membership card: if he does he has an intent to defraud, whether or not a card is usually issued: if he does not then he has no intent to defraud. This is very like the difference between a written and an oral licence which Lord Tucker discussed in *Board of Trade* v. *Owen*. Like Lord Tucker, Professor Smith does not accept the narrowness and technicality of the distinction. Yet, for the reasons that have already been given, such a distinction is justified. And to say that the economic loss test is a narrow, technical notion of defrauding which completely ignores the substance of the matter (as Professor Smith does) begs the very question in issue: namely, what is the substance of *defrauding,* is it deceiving generally, or is it deceiving with the result of economic loss? Fraud and defrauding for the purposes of the tort of deceit may include conduct which results in injury other than economic loss: but this does not mean that "fraud" and "defrauding" should bear the same broad construction in relation to criminal offences which normally involve economic loss.[34]

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[31] [1960] Crim.L.R. 129–132.

[32] [1958] 1 W.L.R. 638.

[33] This would not really apply to the facts of *Woodgate*: for the accused acquired nothing in that case at all. Hence, even on this criticism of the test of economic loss the accused there should have been found not guilty.

To some extent, it is suggested, Professor Smith seems to recognise that the broad principle of *Bassey* (and now *Welham*) is too wide, when he suggests that a better test of intent to defraud would be one of "benefit conferred by the victim." The idea that the accused must intend to derive some benefit from the person to whom the false statement, etc., is made explains many of the cases, although it does not cover the facts of *Woodgate,* and it is only with difficulty that Professor Smith makes it cover the facts of *Garland*. On the other hand, all the cases which Professor Smith justifies on the idea of "benefit" can also be explained in terms of economic loss.

This, of course, is not the real point: the real point is whether the "benefit" test is less artificial, more realistic than the economic loss test. It is suggested that the "benefit" test is not a great improvement. In the first place, in most cases the benefit involved will be an economic one, causing economic loss to the victim. Secondly, where the benefit is not economic it may be a matter of some doubt whether there has been a "benefit": in other words, the courts will be faced with the problem of deciding what is and what is not a benefit for these purposes. Some cases undoubtedly will be clear: but there are bound to be others where the decision may be just as narrowly technical as anything demanded by the economic loss test—which has the merit, at any rate, of being easy to apply.

Although, therefore, Professor Smith's suggested "benefit" test has certain attractive features, it does not meet all the criticisms that have been posed above against taking anything other than the economic loss test. However, both the benefit test and the test of economic loss are now academic: they both require legislation to be effective. This does not mean that the whole discussion is academic. For the criminal law is undergoing review. Hence this discussion. For in view of the conclusions expressed of the decision in *Welham* it is suggested that some re-thinking is desirable in connection with this subject and that this is a suitable topic for consideration by the committee dealing with reform of the criminal law. Should this topic be put before the committee it is hoped that the approach adopted in *Welham* will be scrutinised critically and from the standpoint of the general scope of the criminal law.

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[34] The contrary view was adopted by the House of Lords in *Welham.*

Laboratory Investigation in Firearms Cases

(III)

THE DETERMINATION OF THE RANGE OF A SHOT

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The range from which a shot has been fired is often of the utmost value to the investigating officer and to the courts. It may assist in verifying a statement made by the accused or a witness or be of value in deciding whether a wound could be self inflicted.

Range determination

When a shot has been fired at close quarters there is usually some definite evidence of this revealed on the target. It is often possible to determine, with a fair degree of accuracy, the distance from the muzzle of the gun to the target at the time of firing. This may be indicated by the nature of the damage and the presence of powdering and blackening deposits in the immediate area of the gunshot damage.

When the muzzle of a gun is held in contact with a target at the time of firing, the damage often consists of a characteristic cross-shaped tear due to the violent expansion of the gases escaping from the muzzle of the gun.[1] This damage is usually surrounded by a clearly defined area of blackening and, possibly, scorching, resulting from the combustion products and the flame of the burning gases. Some surfaces show more readily than others the effects of scorching. Scorching also varies with the different classes of firearms and ammunition. For all practical purposes it can be said that scorching will only occur when the shot is fired from a range of a few inches.

When the range is increased from contact to a few inches the nature of the damage consists of a punched-out hole (caused by the missile) which is surrounded by blackening associated with a pattern of partly burnt and unburnt powder grains. There may still be some signs of scorching. Blackening results from the deposit on the target of solid matter from the powder gases, and the range at which blackening can be expected is affected by several factors in the same way as the scorching.

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[1] See fig. 1.

With the increase of the range, the area of blackening and powdering becomes correspondingly greater. The intensity of the blackening decreases until only the powdering remains. Powder grains may be found on the target at ranges up to about six feet, depending on the types of weapon and ammunition used. However, it is usual at ranges greater than three feet to find that little or no traces of powder can be observed.

Various methods are employed to detect these traces when they are not readily visible to the naked eye. These include microscopical methods, chemical tests and examination by infra-red light.

The determination of the range at which these traces are produced can be made by means of a comparison with similar traces produced on test targets at known ranges.

Because the scorching, blackening and powdering is influenced by many factors, such as type and condition of the weapon, barrel length, type and condition of the ammunition, and the nature of the target, it is necessary, in order to obtain comparable results, to use the actual crime weapon and the same type of ammunition as that used in commission of the crime. It is also desirable that the test target should be of a similar nature to that connected with the crime, although this is not so important. It is not always possible to comply with these conditions, but it may still be of value to the court to be able to estimate the range, based on tests carried out with a weapon and ammunition similar to those used in the commission of the crime.

Where the distance between the muzzle and the target is such that powder grains no longer carry to the target, it is not possible from an examination of the damage to estimate the range, except when a shot cartridge has been used.

A microscopical and chemical examination of powder grains present on a target is made with a view to identifying the propellant. This may in turn be of some value in determining the type of ammunition used. Although propellant powders fall into only a few classes, they are manufactured in a large variety of different grain shapes and sizes, for use in various types of cartridge.

An examination carried out by the writer well illustrates the value of such traces associated with gunshot damage. A soldier, billeted in a country house, returned to his quarters and alleged that someone had poked a Sten gun through a hedge and fired a shot at him from a range of only a few feet. He was suffering from a wound in his left side and he produced a webbing belt showing damage to support his allegation.[2] A Sten gun was later found at the scene of the alleged shooting and was identified as being from the armoury at the billet.

The damage to the webbing belt was typical gunshot damage, the entrance and exit sides being clearly indicated, although there was nothing to show that the damage had been caused at close range.

The waistband of the complainant's battle dress blouse revealed a typical bullet hole but, contrary to expectations, this showed an area of heavy blackening together with some powder grains.[2] Further powder grains were located in the lining of the waistband. The nature of the blackening indicated an approximate contact shot. This damage was in no way consistent with that shown on the webbing belt since there were no traces of blackening or powdering on the belt, although it was said to have been worn on top of the waistband of the blouse at the time of the shooting.

It was further ascertained that the powder grains present on the battle dress blouse did not agree with the propellant used in Sten gun ammunition (9 mm. calibre)[3] which was being issued at that time. It was, however, of the same type as that known to be loaded in .38″ service revolver cartridges.[3]

The complainant, a paratrooper, had access to the armoury where both Sten guns and service revolvers, together with the appropriate ammunition, were stored.

It was concluded that the damage to the webbing belt could well have been caused by a shot fired from a Sten gun at a range not closer than two feet, whilst the damage to the waistband of the blouse could not have been caused by a Sten gun as indicated by the complainant, but could have been caused by a shot fired from a .38″ service revolver from a range of only a few inches.

The complainant faced with this information admitted that he had staged the shooting in an attempt to evade further military duty. He had hung the webbing belt in the hedge and fired a bullet from the Sten gun through it. He had later shot himself with a .38″ service revolver, the bullet passing through the waistband of his blouse.

Shot cartridges

The features generally associated with close range gunshot damage apply equally to such damage caused by the use of shot cartridges. Whilst for all practical purposes, in the cases where bulleted cartridges are used, it is not possible to determine the range once it has exceeded that at which powder grains will reach the target, in the case of a shot cartridge the spread of the shot on the target will serve to indicate the range.

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[2] See fig. 2.

[3] See fig. 3.

The spread of a shot charge depends, to a large extent, on the gauge of the individual gun used, and even in guns of a given gauge the spread is influenced to a marked degree by the " choke " or constriction of the muzzle end of the barrel of the gun. The choke in a smooth bore gun can be as much as forty-thousandths of an inch, known as " full choke."

An example of the difference between 12-gauge full choke patterns and true cylinder (*i.e.*, no choke) patterns is shown in the following table of test patterns produced in connection with a recent investigation[4]:

Range	*Approx. Diameter of Spread*	
	Choke	*True Cylinder*
6 feet	2 inches	2½ inches
15 feet	7 inches	9½ inches
24 feet	11½ inches	16 inches
36 feet	18 inches	25 inches

There are many other factors in addition to choke which affect shot patterns, and, in view of this, it is rarely possible to pinpoint the range based solely on the spread of the shot. However, providing that the investigator is familiar with all these factors and bears them in mind when arriving at any conclusions in this respect, it is often possible to determine the range within very close limits. Usually, it is possible to make a more accurate determination in the case of a close range shot than is possible over long ranges.

In assessing the range of a crime shot pattern it is essential that both the crime gun and cartridges of the same type as the crime cartridges are used for test purposes. It is also necessary to establish during the tests that both the gun and the cartridges used are giving consistent results over given ranges, *e.g.*, patterns produced by a gun with badly pitted barrels are often inconsistent. This may also be the case when a barrel shows some distortion, such as a dent or bulge, particularly if it is near the muzzle.

It is often dangerous to apply any rule or formula for the purpose of arriving at the range at which a given pattern has been produced. Although such rules and tables intended for this purpose often appear in literature, at the best they can only serve as a general guide and in many instances they can be very misleading, to say the least.

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[4] See fig. 4.

Shot-cartridge wads, if found at the scene, sometimes help in corroborating or disproving a statement made by a witness regarding the range of a shot. Laboratory tests carried out using a particular gun and cartridges may serve to demonstrate the maximum travelling distance of various wads contained in a cartridge.

Such tests carried out by the writer on these lines some years ago in connection with a charge of murder may be of some interest.

The body of a man was found lying on the roadside in a country lane. He had been shot in the face and head. Police inquiries established that the shot had been fired by a man who explained that the shot was accidental. He indicated a position from which he alleged he had fired his double-barrelled 12-gauge gun at a weasel which his dog had " put up " from a bush.

This position was a distance of 67 feet from the body, and about 40 feet from the alleged position of the weasel at the time of firing.

The police were in possession of some evidence that the accused had previously threatened to shoot the deceased.

The head and cloth cap of the deceased showed a concentrated pellet pattern and the cap had been completely penetrated by a 12-gauge cartridge compression wad, which was found near the body.

Test shot patterns produced with the crime gun indicated that the injuries to the deceased's head could have been caused at a range of approximately 25 feet.

Further tests were carried out with the gun and cartridges of the same type as that used in the crime, to ascertain the maximum range of the compression wad. It was found that the compression wad would generally strike the target at ranges up to 45 feet and occasionally at 50 feet, but that it always fell short of the target at ranges greater than 50 feet.

The results of these tests and the shot patterns indicated that the fatal shot was fired from a much closer range than that made in the statement of the accused, and consequently were of real value to the court.

Shot cartridge wads found in connection with a crime may well be the only means of determining the gauge of the cartridge used, because shot cartridge cases are very rarely ejected at the scene and there is often no way of determining the gauge of the cartridge from pellets which may be found.

Sometimes the wads may also serve to identify the make and type of cartridge.

Occasionally the crime is committed using an unusual type of cartridge, or, sometimes, a standard cartridge which has been modified by the criminal.

In a recently reported case of accidental shooting of a boy beater in the field, the shot causing the fatal injury was found to be " SG " shot, which, since it was being used for the purpose of partridge shooting, is unusual to say the least. In such a shot cartridge the load consists of comparatively few pellets, *i.e.*, eight " SG " pellets to one ounce.

A not uncommon practice amongst night poachers is to reduce the shot charge in a standard cartridge, so that the carcase of a bird shot at close range is not too badly mutilated.

In a recent murder case in which the crime gun and cartridges, etc., were examined by the writer, it was found that the cartridges and the gun had been modified, expressly for the purpose of committing the crime. The gun, which was a single-barrelled 12-gauge gun, had been shortened by cutting off some of the barrel and substantially reducing the length of the stock. The cartridges were 12-gauge No. 5 shot cartridges. The crimped top of the cartridges had been opened and a half-inch steel ball bearing, wrapped in newspaper, had been inserted in position on top of the existing shot charge. Two such cartridges were fired in commission of the crime and four similarly modified cartridges were found in possession of the accused.

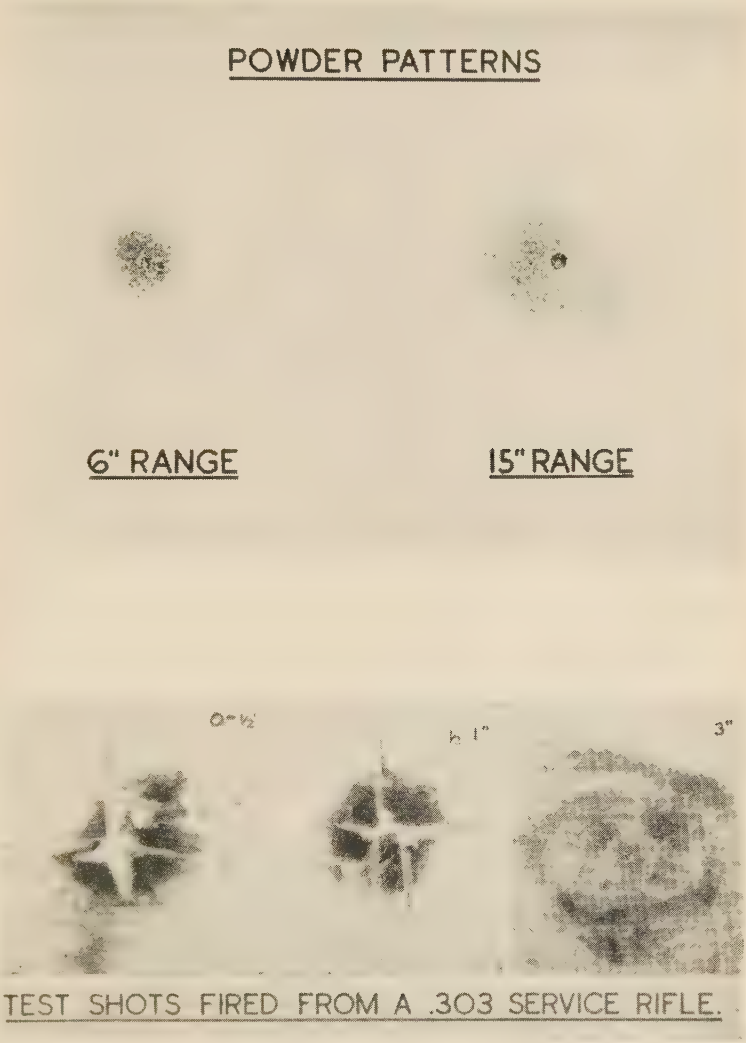
The task of estimating the range of a shot based on the pellet pattern is always rendered more difficult when the cartridges have been modified in any way.

Direction of shot

The direction from which a shot has been fired can often be deduced from an examination of the gunshot damage. The entrance and exit holes caused by a high velocity missile such as a bullet are often characteristic. The close range effects of the gases, flame, smoke and powder are not only diagnostic of gunshot damage, but also clearly indicate the point of entry of the bullet.

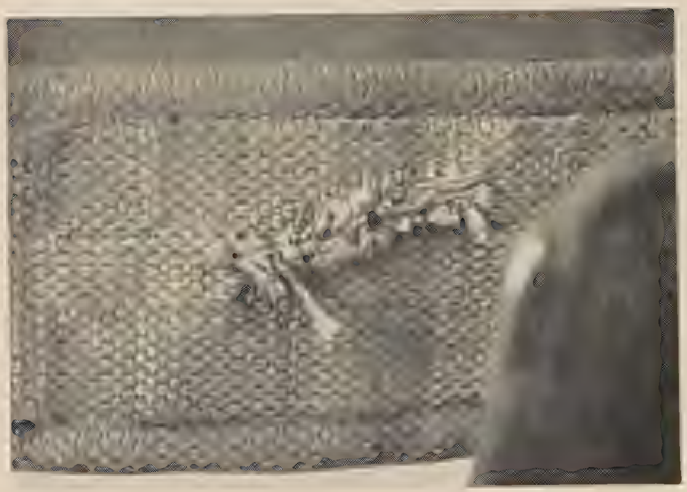
At greater ranges, where these features are not present, the nature of the damage will often help in deciding which is the entrance hole. This is usually smaller than the exit hole and often

Fig. 1

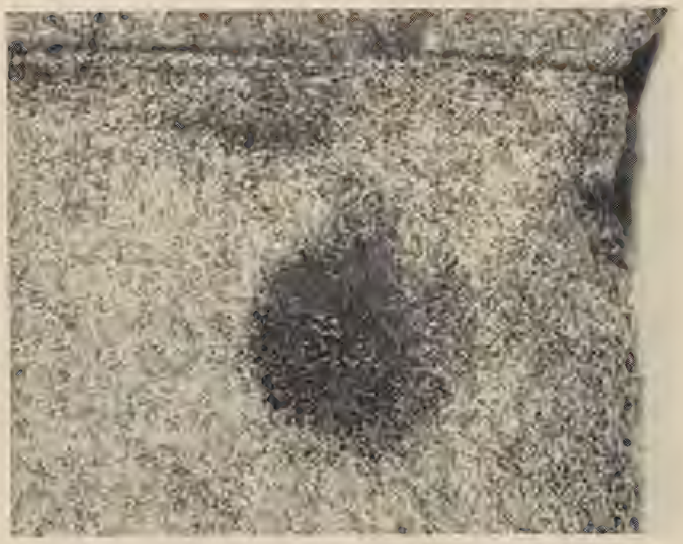

POWDER PATTERNS
6" RANGE
15" RANGE
0-½"
½-1"
3"
TEST SHOTS FIRED FROM A .303 SERVICE RIFLE.

Showing heavy blackening and cruciform tearing typical of approximate contact shots, with an increased area of blackening and absence of tearing at a range of three inches.

Fig. 2

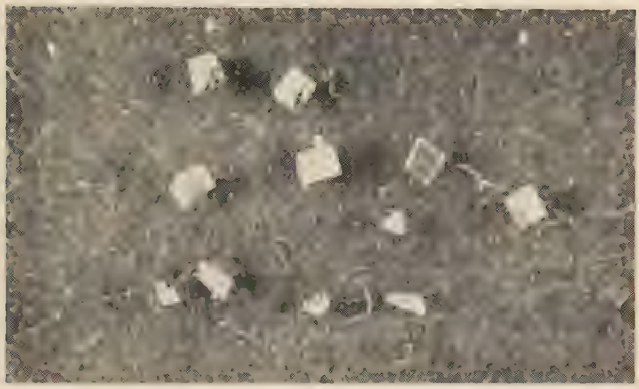


Webbing belt showing alleged sten gun bullet damage.

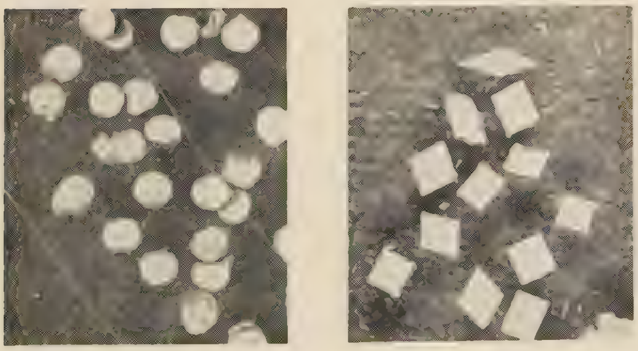


Battle dress blouse showing typical close range bullet damage with heavy blackening surrounding the bullet hole.

Fig. 3

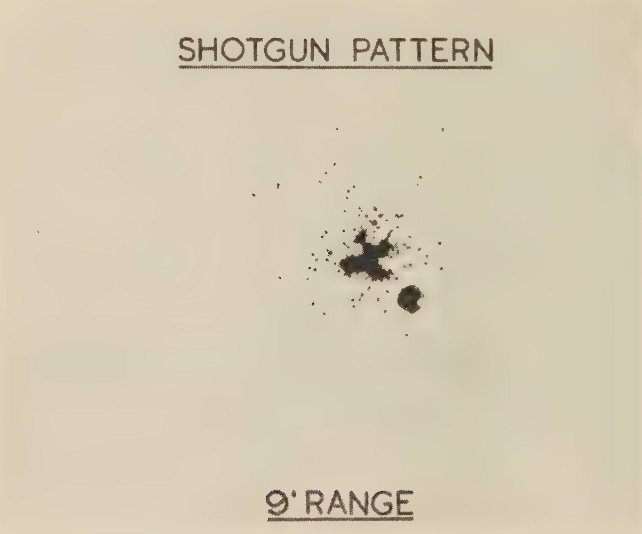


(a) Powder grains found in area of gunshot damage on battle dress blouse.

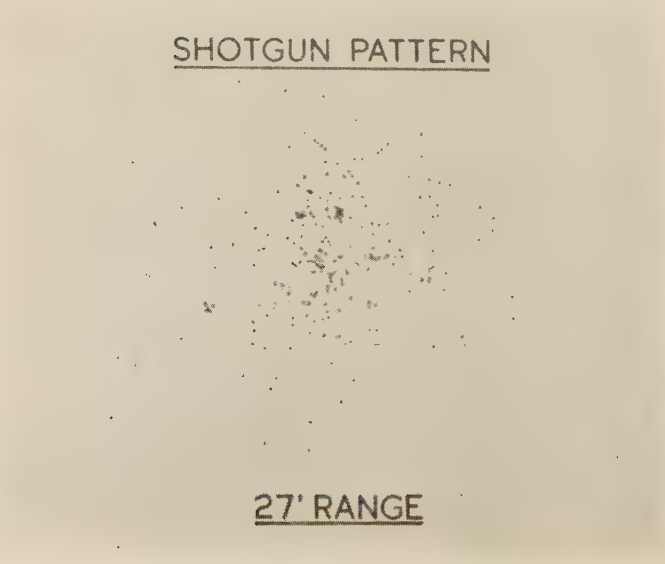


(b) Powder grains from ·38″ service revolver cartridge.
(c) Powder grains from 9 mm. Sten gun cartridge.

Fig. 4


SHOTGUN PATTERN
9' RANGE

Note the circular hole caused by a wad.


SHOTGUN PATTERN
27' RANGE

displays a punched-out effect, whilst the exit hole is often irregular and shows a torn effect.

When a bullet enters at right angles to the surface, the wound is usually circular and slightly smaller than the bullet. This applies equally to bullet holes in any material which possesses some degree of elasticity, *e.g.,* wood. It does not, however, apply to hard or brittle materials like glass or bone, in which case the entry hole has clean-cut edges, and bevelling of the edges indicates the point of exit.

It cannot be over-emphasised that when carrying out control tests as described above it is essential to endeavour to match, in every way possible, the conditions at the time the crime was committed.

Practice and Procedure

Indictment

A count of warehouse breaking contrary to ss. 26 (1), 27 (2) of the Larceny Act, 1916, was held to be bad for duplicity. *R.* v. *Nicholls*, May 16, 1960. See p. 569.

An indictment charging the possession of explosives contrary to s. 4 (1) of the Explosives Substances Act, 1883, was held to be defective because the word " knowingly " was omitted. *R.* v. *McVitie,* May 9, 1960. See p. 589.

Case and Comment [*]

CERTIORARI

Prosecutor not present—costs not allowed

R. v. Liverpool Justices, ex p. Roberts

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Ashworth and Salmon JJ.; [1960] 1 W.L.R. 585.[1]

R. applied for an order of certiorari to bring up and quash an order made by justices, whereby they imposed on him a fine of £2 and ordered that his driving licence be endorsed. The ground of the application was that the justices' order was contrary to the principles of natural justice in that R.'s solicitor was not given an opportunity of being heard by the justices before the conviction was announced. The court allowed the application and granted an order of certiorari.

Neither the justices nor the prosecutor appeared or were represented at the hearing of the application.

R. asked for costs against the prosecutor.

Held, refusing the application for costs, that it was not the general practice of the court to make an order for costs against a party who has not appeared to resist a successful application for an order of certiorari when that party has not materially contributed to the error giving rise to the application.

Per Lord Parker C.J., *obiter dicta*: So far as costs against the justices are concerned, it has been the practice not to grant costs against justices or tribunals merely because they have made a mistake in law, but only if they have acted improperly, that is to say, perversely or with some disregard for the elementary principles which every court ought to obey, and even then only if it was a flagrant instance. [D. C.]

Commentary. A party who unsuccessfully opposes the issue of an order will have to bear the costs: *R.* v. *Cumberland Justices* (1848) 17 L.J.M.C. 133 (mandamus). In that case, however, Wightman J. said:

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[*] Reported, unless otherwise stated, by Henry Palmer and David Calcutt. Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For R.: *Raymond Stock* (instructed by J. B. Izod, for Arthur D. Dean & Co., Manchester).

"Such a general rule would not be applicable to the case of a party who having succeeded in the court below upon an erroneous judgment, offers no resistance to the correction of the error, and is no party to the proceedings in this court by shewing cause against the issuing of the mandamus."

Lord Parker C.J. said in argument that, if this had been a case stated, the applicant would have been entitled to costs. While the decision appears to accord with authority, it is respectfully submitted that there is great force in the argument of the applicant's counsel: "The applicant was in fact wrongly convicted; he could only get the matter put right by incurring costs, and it is not wrong that he should receive those costs out of public funds. It is submitted that there is no reason for making a distinction in the matter of costs between proceedings by way of certiorari and other proceedings whereby appeals may be brought before this court."

EVIDENCE

Admissibility—tape recorders

See HOPES & LAVERY *v.* H.M. ADVOCATE, p. 566

Character—cross-examination as to—Criminal Evidence Act, 1898, s. 1 (f)

R. v. Brown

Court of Criminal Appeal: Lord Parker C.J., Gorman and Ashworth JJ.: May 2, 1960; (1960) 124 J.P. 356.[2]

B. was convicted at quarter sessions of maliciously inflicting grievous bodily harm. The facts were that, following a collision between the car in which B. was a passenger and a van driven by one W., B. hit W. in the mouth with his fist and butted him with his head. B.'s case at the trial was that W. had been the aggressor and that he (B.) had acted in self-defence. It was suggested to W. in cross-examination that W. was quite drunk, that his driving of the van was disgraceful and that he shouted abuse at other cars. In particular he was asked: "And when the car behind you hooted to try and get by, you deliberately stayed longer and stopped in the middle of the road?" W. denied this. The deputy-chairman, after hearing argument, held that B. had brought himself within exception (ii) of the proviso to section 1 (*f*) of the Criminal Evidence Act, 1898, in that "the nature or conduct of the defence" was

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[2] For the appellant: *Gordon Hardy* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Roger Frisby* (instructed by Brignall, White & Orchard, Stevenage).

"such as to involve imputations on the character of the prosecutor." The deputy-chairman, having so ruled, exercised his discretion and permitted B. to be cross-examined about a previous conviction for violence. On appeal to the Court of Criminal Appeal:

Held, dismissing the appeal, that in cross-examining W. defending counsel had gone further than merely developing the defence of self-defence and it was clear that this case came within the exception. This whole question had come before this Court in *R.* v. *Cook*, (1959) 43 Cr.App.R. 138, in which Devlin J. had said that, now it was clearly established that the trial judge had a discretion to be exercised so as to secure that the defence was not unfairly prejudiced, there was nothing to be gained by seeking to strain the words of the subsection in favour of the defence. *Cook's* case also confirmed the well-settled rule that this court would not interfere with the exercise of the trial judge's discretion unless he had erred in principle or there was no material on which he could properly have arrived at his decision. In the present case the nature of the defence was clearly such as to involve imputations on the character of the prosecutor and, there being no grounds for interfering with the exercise of the deputy-chairman's discretion, the appeal would be dismissed. [H. P.]

Commentary. The present case confirms that the words of exception (ii) are to be interpreted literally so that the rape cases (*R.* v. *Sheean* (1908) 72 J.P. 232; *R.* v. *Turner* [1944] K.B. 463) must be treated as exceptional. This approach avoids the necessity for the rather subtle distinctions necessary to reconcile the rape cases with the other decisions and makes for greater certainty in the law but puts a heavier onus on the trial judge in that the matter is almost entirely within his discretion.

Uncorroborated evidence of complainant—insufficient direction to jury

R. v. Clynes

Court of Criminal Appeal: Streatfeild, Donovan and Sachs JJ.: March 28, 1960.[3]

C. was convicted at a Crown Court of indecent assault on a woman of twenty-nine years of age. The only evidence at the trial was that of the complainant, who identified C., and police evidence of statements made by C. C. denied that he was the man. The assault was alleged to have taken place in Spekeland Road and, according to the police, C. said to them: "I never touched the woman: I only asked her for the time in Spekeland Road." C. denied this. The jury were warned of the danger of accepting the uncorroborated evidence of the complainant, but told that they were entitled to do so if they believed the complainant's evidence to be true. On appeal to the Court of Criminal Appeal,

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[3] For the appellant: *P. Bruce* (instructed by Registrar of the Court of Criminal Appeal). For the Crown: *R. Z. H. Montgomery* (instructed by the Town Clerk of Liverpool).

Held, allowing the appeal, that the recorder had given a correct warning, so far as it went, on the question of corroboration but he had failed to describe what was meant in law by corroboration. It was true that the trial judge was not bound to draw the jury's attention to specific items of evidence which might or might not be corroboration; but it was at least necessary in order to make the warning intelligible to the jury to explain what was meant by corroboration. No particular language was necessary, but the jury should at least be told that what was required was some independent evidence of some material fact implicating the accused and tending to confirm that he was guilty of the offence. The one matter in the present case which might be regarded as corroboration was the alleged statement to the police which on the face of it was inconsistent with C.'s denial that he was there at all. The question whether a lie amounted to corroboration was dealt with in *Credland* v. *Knowler* (1951) 35 Cr.App.R. 48. A lie might or might not amount to corroboration according to the circumstances. A lie, for instance, arising out of pure panic was not corroboration, whereas a lie arising from a man's sense of guilt might be. This was a matter which ought to be carefully explained to the jury and left to them. Unfortunately in the present case the matter was left to the jury without any direction as to what principles they ought to apply in deciding whether it was corroboration or not. It was impossible to say whether on a proper direction the jury would have been likely to come to the same conclusion and, accordingly, the appeal would be allowed. [H. P.]

Commentary. While the judge may point out the evidence capable in law of being regarded as corroboration, it must be left to the jury to decide whether the evidence amounts to corroboration or not: *R.* v. *Tragen* [1956] Crim.L.R. 332. They can hardly perform this function unless they are given some instruction as to the nature of the law's requirements in the matter.

EXPLOSIVES

Indictment—no offence disclosed—" knowingly " omitted—Explosive Substances Act, 1883, *s.* 4 (1)

R. v. McVitie

Court of Criminal Appeal: Lord Parker C.J., Stable, Donovan, Ashworth and Salmon JJ.: May 9, 1960; [1960] 3 W.L.R. 99.[4]

M., with three others, was convicted at quarter sessions of possessing explosives contrary to section 4 (1) of the Explosive Substances Act, 1883. The words of the indictment on which the four men were charged were: " Statement of Offence: Possessing explosives contrary to section 4 (1) of the Explosive Substances Act, 1883: Particulars of Offence: You had in your possession a certain explosive substance . . . under such circumstances as to give rise to a reasonable suspicion that it was not in your possession for a lawful object." Two of the men successfully appealed to the Court of Criminal Appeal ([1960] Crim.L.R. 57) on the grounds that the jury had not been directed that an essential ingredient of the offence was *knowingly* to have possession, and also that the word " knowingly " had been omitted from the Particulars of Offence. On arraignment the Particulars of Offence above had been read and M. appealed to the Court of Criminal Appeal on the ground that by reason of the omission of the word " knowingly " he had been tried and convicted in respect of an offence unknown to the law. M. had admitted that he knew he had explosives in his possession and it was conceded that he had not been embarrassed by the omission. It was contended on behalf of M. that the indictment was not merely defective but bad, in that it disclosed no offence, and that accordingly there had been a miscarriage of justice precluding the application of the proviso to section 4 (1) of the Criminal Appeal Act, 1907.

Held, dismissing the appeal, that the indictment in the present case was defective. Section 3 (1) of the Indictments Act, 1915, provided that every indictment should contain sufficient particulars of an offence as might be " necessary for giving reasonable information as to the nature of the charge." The word " knowingly " should, therefore, have been included in the Particulars of

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[4] For the appellant: *C. G. L. Du Cann, Beryl Cooper* (instructed by W. B. Blackwell & Co.). For the Crown: *F. H. Lawton, Q.C., J. G. Leech* (instructed by the Director of Public Prosecutions).

Offence, but this omission did not make the indictment bad. This indictment disclosed an offence known to the law with incomplete particulars. This court did not think that *R.* v. *Hyde* (1934) 24 Cr.App.R. 149 (where a conviction was quashed on the ground that certain material words were omitted from the particulars; and the proviso was not applied) ought to be followed in the present case. In *R.* v. *Thompson* [1914] 2 K.B. 99 this court had applied the proviso in a case where the indictment was held bad for duplicity; and the court had said that the proviso ought to be applied where no embarrassment or prejudice had been suffered by the accused. In the present case it was clear that no embarrassment or prejudice had been caused to the appellant by reason of the defect in the indictment. The appellant had admitted being knowingly in possession of the explosive substance and that the essential ingredient of the offence had, therefore, been established. Accordingly, the proviso to section 4 (1) of the Criminal Appeal Act, 1907, would be applied on the ground that no substantial miscarriage of justice had occurred. The appeal would be dismissed. [H. P.]

Commentary. The vital point in the present case seems to be that the Statement of Offence, by its reference to the Act, disclosed an offence known to the law. The position was precisely the same in *Hyde* where the conviction was quashed. The Court of Criminal Appeal regards itself as bound by its own decisions, subject to the rule, laid down in *R.* v. *Taylor* [1950] 2 K.B. 368, that it is the duty of the court to reconsider an earlier decision on the strength of which an accused person has been sentenced and imprisoned. This principle would seem to have no application where the earlier decision is favourable to the accused in the later case—as was the situation in the present appeal. The court appears to have been of the opinion that *Hyde* was distinguishable and that, therefore, no point of precedent arose. The distinction taken was that in *Hyde* the court acted on the view that the indictment disclosed no offence; but, as the present court simply disagreed with that view (as it was bound to do, in view of the precisely similar nature of the facts, in order to hold that the indictment in the present case disclosed an offence) it would seem that the distinction was not one of fact but of the interpretation of the facts. In that case, the court was really saying that the earlier case was wrong on a point of law and thus holding itself not bound by its earlier decision, although the earlier decision was favourable to the accused.

Whether the doctrine of precedent should apply to the exercise by the court of its discretion in relation to the proviso is another question which was raised in argument in the present case, but not fully explored and, in view of the line taken by the court, no decision on it was necessary. It is submitted that the doctrine of precedent should play no part in regulating the exercise of a discretion of this kind and (with respect) that this would have been a better way of disposing of *Hyde's* case.

MAGISTRATES

Litter—" depositing and leaving" not continuing offence under Litter Act, 1958, s. 1—no jurisdiction

Vaughan v. Biggs

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Donovan and Davies JJ.; [1960] 1 W.L.R. 622.[5]

V. was charged with depositing and leaving a derelict motor-car on a public open space on or before April 2, 1959, contrary to section 1 of the Litter Act, 1958.

Section 1 provides: " If any person throws down, drops or otherwise deposits in . . . any place in the open air to which the public are entitled . . . to have access without payment, and leaves, anything whatsoever in such circumstances as to cause . . . the defacement by litter of any place in the open air, then, unless that depositing and leaving was authorised . . . he shall be guilty of an offence ".

The magistrates found that a derelict motor-car, constituting litter, was deposited on a public open space by V. without lawful authority. The date on which the car was deposited was not proved.

It was contended on behalf of the defendant that the information was not proved to have been laid within six months of the alleged offence, as required by section 104 of the Magistrates' Courts Act, 1952. It was contended by the prosecutor that the offence charged was a continuing offence, and that the information was laid within the requisite period. The magistrates found the offence proved. On appeal to the Divisional Court:

Held, allowing the appeal, that there were two ingredients to the offence under section 1, namely, the depositing, and the leaving, and the offence was not committed unless both depositing and leaving occurred; depositing was an act fixed in point of time and not a continuing one; accordingly, it was not proved that the offence was committed within six months, and since that was not proved, it was not proved that the magistrates had jurisdiction. [D. C.]

Commentary. Compare *Edwards* v. *Bull* (1956) 54 L.G.R. 338; [1956] Crim.L.R. 416; where it was held that " maintaining " a stand contrary to the Rhyl U.D.C. Act was a continuing offence. It would seem from the present case that if the offence under the Rhyl Act had been defined as "*establishing* and maintaining" a stand it would not have been a continuing offence. An offence, it would seem, is only "continuing" if all the elements in the *actus reus* are of a continuing nature.

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[5] For V.: *Donald Farquharson* (instructed by Denton, Hall & Burgin, for Walter L. Williams & Sons, Fishguard). The prosecutor did not appear and was not represented.

ROAD TRAFFIC

Excise licence not in force—Vehicles (Excise) Act, 1949, s. 15 (1)—mitigating circumstances

Patterson v. Helling

Queen's Bench Divisional Court: Lord Parker C.J., Gorman and Ashworth JJ.: May 5, 1960[6]

An information was preferred against H. alleging that he on January 23, 1959, did use a mechanically propelled vehicle on a road for which an excise licence was not in force, contrary to section 15 (1) of the Vehicles (Excise) Act, 1949. The justices found the offence proved, but they also found a number of mitigating circumstances. They were of opinion that the offence was of such a highly technical and trifling nature and so materially contributed to by circumstances beyond H.'s control that it was a proper case to dismiss in accordance with the principle *de minimis non curat lex*. They accordingly dismissed the information. On appeal by the prosecutor:

Held, allowing the appeal, that the justices were not entitled to use the mitigating circumstances as a ground for saying that the offence was trivial and that the information could therefore be dismissed. The case must be remitted with an intimation that the offence was proved, leaving it to the justices to impose such penalty as they thought fit having regard to the mitigating circumstances.

[E. M. WELLWOOD, *Barrister-at-Law*.]

Commentary. The scope of the application of the *de minimis* principle in the criminal law must clearly be very limited indeed. Thus, it would be no defence to an indictment for larceny that the property stolen was a piece of paper valued at only one penny; and where the accused walked through a field of knee-deep grass he was held guilty under the Malicious Damage Act, 1861, s. 52 (1), of unlawfully and maliciously damaging the grass to the amount of sixpence: *Gayford* v. *Chouler* [1898] 1 Q.B. 316. It would seem that, once the technical elements of the offence are proved, the triviality of the facts is relevant only to the question of punishment.

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[6] For the prosecutor: *H. T. Leonard* (instructed by Kenneth Goodacre, Solicitor, Middlesex County Council). The respondent did not appear and was not represented.

Insurance—onus on accused to prove he had a policy—Road Traffic Act, 1930, s. 35

Philcox v. Carberry

Queen's Bench Divisional Court: Lord Parker C.J., Gorman and Ashworth JJ.: May 5, 1960.[7]

C. was charged before justices with (i) unlawfully driving a motor-cycle on a road in Rochester on March 20, 1959, while being disqualified from holding or obtaining a licence, contrary to section 7 of the Road Traffic Act, 1930, and (ii) with using the motor-cycle on a road there not being in force a policy of insurance in respect of the use thereof contrary to section 35 of the Act. The justices found that C. had been convicted three weeks previously of an offence under section 5 (3) of the Act and disqualified from holding a licence. They rejected evidence given by C. that his motor-cycle had been dismantled on the day of the alleged offences, accepted the evidence of a police officer that he had been seen driving it, and found the offence under section 7 proved. In relation to the offence under section 35, no evidence was given by C. or questions asked by the prosecutor in relation to a policy of insurance. The magistrates were of opinion that although an offence under section 7 had been proved it did not follow, in the absence of some reference to the matter in the evidence called by the prosecution, that a policy of insurance was not in force at the time. They accordingly dismissed that information. On appeal by the prosecutor:

Held, allowing the appeal, that although this was a case where one would have expected the prosecution to lead evidence as to whether or not a policy of insurance was in force, the case was concluded by *John* v. *Humphries* [1955] 1 W.L.R. 325, which applied the principles of *R.* v. *Oliver* [1944] K.B. 68 to the Road Traffic Acts. Applying those principles to the present case, the onus of proving that a policy of insurance was in force was upon C. as it was a fact peculiarly within his knowledge. In those circumstances, as he had given no evidence with regard to the policy, the case must be remitted to the justices with the information that the offence under section 35 was proved, leaving them to impose a suitable penalty.

[E. M. Wellwood, *Barrister-at-Law.*]

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[7] For the prosecutor: *Michael Parker* (instructed by Sharp, Pritchard & Co.). For C.: *N. K. Cooper* (the Town Hall, Maidstone).

Commentary. It is an established rule of evidence that "where the truth of a party's allegation lies peculiarly within the knowledge of his opponent, the burden of disproving it lies upon the latter" (*Halsbury's Laws of England,* 3rd ed., Vol. 15, 270.). In the criminal law it is submitted that the rule should be confined to cases where it is an offence to do some act in the absence of a licence or permission and similar cases. It was stated by Talbot J., *obiter*, in *Williams* v. *Russell* (1933) 149 L.T. 190, that on a charge of using a motor vehicle without there being in force a policy of insurance, the onus was on the accused to prove he had a policy. This would seem, with respect, a proper application of the principle and is confirmed by the present case.

Whether the rule imposes on the accused a burden of proof, properly so called, or merely requires him to introduce so much evidence as might raise a doubt in a jury's mind, does not seem to have been authoritatively decided. *Cf.* Glanville Williams, *The Criminal Law: The General Part,* Section 230.

Notice of intended prosecution—Road Traffic Act, 1930, *s.* 21—*whether necessary to raise it as preliminary issue*

R. v. Edmonton Justices, ex p. Brooks

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Byrne and Donovan JJ.: [1960] 2 All E.R. 475[8]

B. was charged with driving a motor-vehicle on a road without due care and attention. At the trial of the information, the justices refused to allow cross-examination of a prosecution witness, or to hear evidence for the defence, on the question whether the notice of intended prosecution, pursuant to section 21 of the Road Traffic Act, 1930, had been given. The justices' reason for so refusing was that the question had not been raised as a preliminary issue. On appeal against conviction:

Held, allowing the appeal, that although it was a convenient practice to raise the question of the giving of a notice of intended prosecution as a preliminary issue, a defendant was not bound to do so, but could wait until the appropriate prosecution witness gave evidence; and that, accordingly, the conviction was contrary to natural justice. [D. C.]

Commentary. The onus of proving that the requirements of section 21 have not been complied with is on the accused, and it is for him to raise the issue. But there is nothing in the Act to say at what point in the trial the issue should be raised. It is simply provided that a person "shall not be convicted unless . . ." the requirements of the section are satisfied. In these circumstances, the imposition of a requirement that the matter be raised as a preliminary issue would have amounted to an assumption of legislative power by the court.

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[8] For B.: *J. A. Nevin* (instructed by Alder & Alder). The respondents did not appear and were not represented.

Notice of Intended Prosecution—warning to be given " at the time the offence was committed "—Section 21, Road Traffic Act, 1930

Jollye v. Daley

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Gorman and Ashworth JJ.: [1960] 2 W.L.R. 1027.[9]

At 5.30 p.m. one evening a police officer considered that J. was driving on a highway in a manner dangerous to the public and accordingly requested J. to stop. J. however, drove on, and drove several miles before he was apprehended. He was taken to a police station, suspected of being under the influence of drink, but after a medical examination was pronounced fit to drive. He was then warned, at about 7.10 p.m., that the police would consider prosecuting him for careless or dangerous driving, and that warning was repeated at 7.30 p.m. Five weeks later a summons was served on him for dangerous driving.

On appeal it was contended on J.'s behalf that the warnings did not comply with the requirements of section 21 of the Road Traffic Act, 1930, in that he was not warned " at the time the offence was committed."

Held, dismissing the appeal, that the words " at the time the offence was committed " must be looked at in a general way, and that their meaning could not be limited to the exact point of time at which the offence was committed. Whether or not a warning had been given at the time of the offence was a question of degree in every case and therefore of fact, and on the facts, it had been given within such time as could be said to be " at the time the offence was committed." [D. C.]

Commentary. In *Jeffs* v. *Wells* (1936) 100 J.P. 406, Avory J. said that the warning was good because it was given as soon as reasonably possible after the arrival of the police and while the parties were still at the scene of the accident. Lord Parker C.J. doubted the validity of this test, " because one can envisage cases, in particular where the police have to pursue an alleged offender for a long distance, when the earliest opportunity might be hours later, and at a point many miles distant".

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[9] For J.: *David Lloyd* (instructed by Amery-Parkes & Co.). For the prosecutor: *E. A. Machin* (instructed by Ottaways, St. Albans).

SCOTS LAW

Evidence—admissibility—tape recorders

Hopes & Lavery v. H.M. Advocate

Court of Criminal Appeal: Lord Justice-General (Clyde), Lords Carmont and Sorn.[10]

H. and L. were convicted of extorting money by threats. The Crown case included evidence by the victim of meetings at which money was extorted and in particular of a meeting at a railway station with L. within sight of police observers when the victim wore a lapel microphone and transmitter supplied by the police, who listened at a nearby receiving set and recorded the conversation by tape recorder for purposes of corroboration. H. and L. applied for leave to appeal against conviction on the ground that the evidence of a police inspector's recollection of what he had heard over the receiving set and evidence of a police stenographer who had made a shorthand analysis of the contents of the tape recording, which though played over to the jury was marred by background noises and some voice overlap, was in each case secondary and not the best evidence and should not have been admitted. No objection was taken to the evidence of the tape recording itself.

Held, that the evidence of the police inspector was as competent as that of the tape recording but that the evidence of the stenographer, who was not a skilled witness, was probably not competent. There was sufficient evidence, with other material, to support conviction, and the appeals failed.

Commentary. A mechanical recording was played to the court in *Parker* v. *Mason* [1940] 2 K.B. 590 (see p. 599) and tape recordings and transcript were admitted in *R.* v. *Burr & Sullivan* [1956] Crim.L.R. 442 and it is believed in *R.* v. *Silver* [1956] Crim.L.R. 388. In the inferior courts recordings of the nuisance caused by cockerels were admitted in *Chapple* (1956) 126 J.P. 493, but recordings were rejected in a case noted in [1957] Crim.L.R. 709. An indistinct tape of which a transcript could not be made was played over in *R.* v. *Bracey* [1959] Crim.L.R. 231 to mitigate the offence of wounding with intent to cause grievous bodily harm to which the accused had pleaded guilty by showing that she was not the aggressor. There are no cases in the Scottish reports, but it has long been competent to identify a party speaking by telephone by his voice: *McGiberan* v. *Auld* (1894) 21 R.(J.) 69.

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[10] For the appellants: *J. G. Milligan & Hector Maclean* (instructed by A. M. Wishart, W.S.). For the Crown: *A. D. Carmichael* (instructed by Lionel I. Gordon, Crown Agent).

See the articles in [1954] Crim.L.R. 96 and [1959] Crim.L.R. at p. 8.

[*Report and commentary by* ALISTAIR BROWNLIE, S.S.C.]

Review—application to hear new evidence—Criminal Appeal (Scotland) Act, 1926, *s.* 6 (6)*—test of admissibility*

In STIRLING *v.* H.M. ADVOCATE[11] (High Court of Justiciary: Lord Justice General (Clyde), Lords Carmont and Russell).[12]

S., who was convicted of a double capital murder and theft and sentenced to death, appealed against conviction. He had attempted to plead guilty but the plea was refused and trial at which he refused legal and medical assistance proceeded and included the evidence of two Crown psychiatrists as to mental capacity. Before hearing of the appeal S. presented a supplementary application substituting new grounds. The application narrated that an eminent psychiatrist as a result of new disclosures by S. possessed evidence that S. was of diminished responsibility, and that at the time of his trial he had been incapable of appreciating his condition and the need for taking legal and medical advice and for co-operating with the Crown psychiatrists, all of which would constitute evidence material and relevant to lead to a different verdict to that reached by the trial jury.

Held, that the application did not disclose circumstances sufficient to satisfy the condition that the new evidence if given would have led the jury considering new and old together to a different verdict, and appeal dismissed.

Commentary. The court will not admit new evidence simply because it was not available at the trial and in any event will not re-try the case. They will however hear new evidence if there is reasonable excuse for the failure to adduce it at the trial, and if satisfied that if led it must have resulted in the jury's verdict being different: *Gallacher* v. *H.M. Advocate*, 1951 J.C. 38. The present case was an attempt to show that the accused's failure to have legal and medical advice and to appreciate his position was due to his mental condition which if established would have had the effect of reducing the crime from murder to culpable homicide and thus would have led to a contrary verdict. The appeal was dismissed, but the accused's sentence was subsequently respited to one of life imprisonment.

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[11] For the appellant: *Bennett, Q.C., Cay* (instructed by Alistair R. Brownlie, S.S.C.). For the Crown: *Solicitor-General* (*Grant, Q.C.*), *R. S. Johnston, Q.C., A.D.* (instructed by Lionel I. Gordon, Crown Agent).

[12] [1960] Crim.L.R. 265.

New evidence was heard by the Scottish court in *Slater* v. *H.M. Advocate*, 1928 J.C. 94, in *Lowson* v. *H.M. Advocate*, 1943 J.C. 141 and in two unreported cases.

The equivalent English authority for allowing fresh evidence on appeal is contained in the Criminal Appeal Act, 1907, s. 9. In *Kursach* (1917) 13 Cr.App.R. 13, *Ward* (1922) 17 Cr.App.R. 65 and *Jones* (1928) 21 Cr.App.R. 27 the court allowed new evidence, but the request has frequently been refused, usually with the comment that the matter is properly one for the Home Secretary to refer under section 19 of the Act. The most notable case was perhaps *Rowland* (1947) 32 Cr.App.R. 29, where the court refused to hear the alleged confession by another to the murder for which the appellant had been convicted and for which he was subsequently executed. The English cases have not consistently maintained the strict standard demanded in *Gallacher's* case and in *R.* v. *Robinson* [1917] 2 K.B. 108 allowed evidence of events subsequent to conviction (see also *R.* v. *Thomas* [1959] Crim.L.R. 841); but in *Mason* (1923) 17 Cr.App.R. 160, observed that they would apply the section with very great caution. In *Lumb* (1912) 7 Cr.App.R. 263 it was doubted whether expert evidence as to insanity could be admitted under section 9. Evidence of insanity was disallowed in *Tellett* (1920) 15 Cr.App.R. 13 and in *Dashwood* (1942) 28 Cr.App.R. 167.

As to whether the same standard applies in cases referred to under section 19 see *Higgins*, 1956 J.C. 69.

[*Report and commentary by* ALISTAIR BROWNLIE, S.S.C.]

SENTENCE

Sentence—later court cannot override sentence of earlier court

R. v. Craven

Court of Criminal Appeal: Hilbery, McNair and Davies JJ.: June 14, 1960.[13]

C., whilst on probation, was convicted at the C. quarter sessions of obtaining money by false pretences and larceny and, thirty-two other offences being taken into consideration, was sentenced to three years' imprisonment. C. then applied to the Court of Criminal Appeal for leave to appeal against that sentence, which was refused. On being brought back to the S. quarter sessions (where he had originally been placed on probation), C. was sentenced to three years' corrective training. On appeal to the Court of Criminal Appeal against sentence:

Held, that the S. quarter sessions had in effect imposed corrective training to take the place of the sentence of imprisonment which had been affirmed by this court by their refusal of leave to appeal. A man could not serve a sentence of corrective training and one of imprisonment at the same time, and it was quite wrong that, when the C. quarter sessions had determined the appropriate sentence, another court should impose a sentence which, in effect, would set that sentence aside. Accordingly, a sentence of twelve months' imprisonment, to run concurrently with the sentence of three years' imprisonment, would be substituted for the sentence of corrective training. [H. P.]

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[13] For the appellant: *P. Bruce* (instructed by the Registrar, Court of Criminal Appeal). The Crown was not represented.

TRIAL

Explosives — Indictment — no offence disclosed — " knowingly " omitted

See R. *v.* McVitie, *ante*, p 559.

Indictment bad for duplicity—Information charging offences in alternative

R. v. Nicholls

Court of Criminal Appeal: Byrne, Sachs and Winn JJ.: May 16, 1960.[14]

N. was charged at the Central Criminal Court upon an indictment framed as follows: " Statement of Offence: Warehouse-breaking contrary to sections 26 (1) and 27 (2) of the Larceny Act, 1916. Particulars of Offence: " You broke and entered a warehouse . . . to steal therein and stole therein twenty-two overcoats . . ." At the conclusion of the case the jury were asked whether they found the prisoner guilty or not guilty of warehouse-breaking on the indictment, and the foreman of the jury answered: " Guilty." On appeal to the Court of Criminal Appeal,

Held, allowing the appeal, that the indictment was bad for duplicity. The maximum penalty for breaking and entering and stealing contrary to section 26 (1) was fourteen years' imprisonment. The maximum penalty for breaking and entering with intent contrary to section 27 (2) was seven years. On looking at the record in this case no one could tell whether N. had been convicted of an offence carrying a maximum punishment of fourteen years or of an offence carrying a maximum punishment of seven years. Sections 26 (1) and 27 (2) of the Act were separate and distinct sections creating separate and distinct offences. The offences ought to have been charged in two separate counts. The appeal would, therefore, be allowed. [H. P.]

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[14] For the appellant: *J. E. Pullinger* (instructed by Registrar of the Court of Criminal Appeal). For the Crown: *H. J. Leonard* (instructed by Solicitor for the Metropolitan Police).

Commentary. "It is an elementary principle that an information must not charge offences in the alternative, since the defendant cannot then know with precision with what he is charged and of what he is convicted and may be prevented on a future occasion from pleading *autrefois acquit*": *R.* v. *Surrey Justices, ex p. Witherick* [1932] 1 K.B. 450, *per* Avory J.

The proper time to apply to quash an indictment is before plea; but if an objection that a count is bad for duplicity is not taken before verdict, it may still be a good ground of appeal and the court is under a duty to decide the matter according to law: *R.* v. *Molloy* [1921] 2 K.B. 364; *R.* v. *Wilmot* (1933) 24 Cr.App.R. 63.

Principles of Punishment

Sentences in the Court of Criminal Appeal

Prepared by HENRY PALMER, *Barrister-at-Law*

Corrective training

See R. *v.* CRAVEN, pp. 568–569.

Imprisonment

In R. *v.* CUFF the court (Lord Parker C.J., Byrne and Donovan JJ.: May 24, 1960) reduced a sentence of eighteen months' imprisonment to one of nine months' imprisonment. C. had been placed on probation at quarter sessions in 1958 for warehousebreaking and larceny and, two other offences being taken into consideration, was placed on probation for two years. During the currency of the probation period he was convicted at a magistrates' court of being found on enclosed premises and was sentenced to three months' imprisonment. On being brought before the quarter sessions on the breach of probation he received the present sentence of eighteen months' imprisonment, consecutive to the three months' sentence. At the time of the original offences C. was twenty years of age and had no previous convictions for serious crime. The court stated that the offences for which C. fell to be sentenced on the breach of probation were three serious offences of breaking and entering, but he had been accompanied on all those occasions by another man, an experienced criminal, who was ten years older. The other man had been sentenced to eighteen months' imprisonment and, having regard to the circumstances and to C.'s age and previous character, one would have expected C. to receive a lesser sentence. The appropriate sentence was one of nine months' imprisonment, consecutive to the three months' sentence, and accordingly that sentence would be substituted for the sentence of eighteen months' imprisonment.

In R. *v.* FRENDO the court (Lord Parker C.J., Hilbery and Diplock JJ.: June 20, 1960) affirmed a sentence of four years' imprisonment. F. had pleaded guilty at a Crown Court to living on prostitution. He was a man of twenty-two years of age, a native of Malta, and had three previous convictions of serious crime (of a different nature to the present offence). F. had met a girl of sixteen in a café and, having taken her away to live with him, told her, and forced her, to go out and earn her living on the streets.

The girl gave all the money which she earned to F. The court stated that they could see nothing wrong in principle with this sentence. It was high time that people who lived on the earnings of prostitution, and there were far too many of them, realised the sort of sentences they would now get. The sentence of four years' imprisonment for this offence was not unduly severe and would, accordingly, be affirmed.

In R. *v.* MASON the court (Lord Parker C.J., Hilbery and Diplock JJ.: June 20, 1960) reduced a sentence of fifteen months' imprisonment to one which would permit immediate discharge. M. had pleaded guilty at the Central Criminal Court to two offences of warehouse-breaking and larceny. M., who was a boy of seventeen years of age (at the date of sentence), had one previous conviction of larceny when he was eight years of age. The court stated that they had called for a probation report which, on the whole, was good. The probation officer said that M.'s behaviour in custody had been satisfactory and that it was apparent that the period of imprisonment had had a salutary effect on him. M. had now served nine months in prison. This court thought that, in all the circumstances, he had served long enough. Accordingly, a sentence such as would permit M. to be released immediately would be substituted for the sentence of fifteen months' imprisonment.

Preventive detention

In R. *v.* MITCHELL the court (Hilbery, McNair and Davies JJ.: June 14, 1960) reduced a sentence of eight years' preventive detention to one of three years' imprisonment. M. had pleaded guilty at a magistrates' court to stealing a radio set worth £12 12s. 0d. and had been sentenced by quarter sessions. M., who was a man of forty years of age, had fourteen previous convictions. The court stated that, although M. had had fourteen previous convictions, the longest sentence he had ever received had been three years' imprisonment, and that was for an offence of buggery and not for an offence of dishonesty. M. had been last released from a short sentence of imprisonment in February 1959 and had kept out of trouble for about eleven months. On the whole this court thought that M. was not quite ripe for preventive detention, although this would be his last opportunity of avoiding such a sentence. A sentence of three years' imprisonment would, accordingly, be substituted for the sentence of preventive detention.

In R. *v.* BOWLES the court (Byrne, Sachs and Winn JJ.: May 17, 1960) varied a sentence of seven years' preventive detention to one of seven years' imprisonment. B. had been convicted of living on the immoral earnings of a prostitute who was his wife. He was a man of just over thirty years of age with two previous convictions, in 1952 and 1958, for the same offence. He had other previous convictions, including one for possessing a revolver and burglary and larceny. The court stated that B. had a bad record and after his six months' sentence in 1958 for living on the immoral earnings of his wife (the same woman as in the present case), he was only released from prison in April 1959. He then returned to live with the same woman. Having regard to B.'s age, this court considered that the sentence ought to be varied from seven years' preventive detention to seven years' imprisonment.

Borstal training

In R. *v*. JAMES the court (Lord Parker C.J., Hilbery and Diplock JJ.: June 20, 1960) varied a sentence of borstal training to one of three months' imprisonment. J., who was a young woman then seventeen years of age, had been found guilty at a juvenile court as a rogue and a vagabond under the Vagrancy Act, 1824, and placed on probation for two years. During the currency of the probation order she was brought before a magistrates' court on a summons alleging that she was in breach of the probation order by failing to notify a change of address. She was thereupon committed to quarter sessions, where she was sentenced to borstal training. The court stated that under section 4 of the Vagrancy Act, 1824, the maximum sentence was one of three months' imprisonment. Although it was clear that J. was in need of training and was in fact benefiting from training, it was wrong to impose borstal training in these circumstances. As Lord Goddard C.J. had said in *R.* v. *Longstreeth* (June 23, 1952), the appellant could be deprived of his liberty for the original offence only for three months, whereas borstal training necessarily involved a much longer period. That decision ought to be followed and, accordingly, a sentence of three months' imprisonment (which the appellant had now in fact served) would be substituted for the sentence of borstal training.

Acts and Orders [*]

Aliens

Aliens who before May 4, 1960, have been granted leave to land in the United Kingdom subject to the condition that they shall not enter employment paid or unpaid without the consent of the Minister of Labour and National Service, whether or not that condition was associated with the condition that they should register at once with the police, but subject to no other condition whatsoever, are no longer subject to that restrictive condition. ALIENS (LANDING CONDITIONS) ORDER, 1960 (S.I. No. 828) (2d.).

Animals

The principal Regulations (S.I. 1958 No. 2166) which otherwise came into operation on January 1, 1959, provided for the deferment of certain requirements relating to the construction, layout and equipment of existing slaughterhouses, until such later dates as the Minister might appoint. The date on which such provisions shall come into operation in the Metropolitan Borough of Lewisham, and in the districts of Benfleet, Letchworth, Hartismere and Pewsey, is now specified as July 1, 1960. SLAUGHTER OF ANIMALS (PREVENTION OF CRUELTY) REGULATIONS (APPOINTED DAY—NO. 1) ORDER, 1960 (S.I. No. 911) (3d.); SLAUGHTERHOUSES (HYGIENE) REGULATIONS (APPOINTED DAY—NO. 1) ORDER, 1960 (S.I. No. 912) (3d.).

London Traffic

The principal Regulations (S.I. 1958 No. 1093), as amended, which impose restrictions on the sale of goods from vehicles, on vehicles with regard to waiting and unloading and on the use of vehicles for the purposes of advertisement in certain streets in the City of London, in Metropolitan Boroughs and in other districts within the London Traffic Area, are further amended. The main changes are (1) the above restrictions now apply in additional streets in Barnet, Bethnal Green, Chelsea, Croydon, East Ham, East Molesey, Greenwich, Hampstead, Kingston-upon-Thames, Peckham, Plumstead, Sydenham, Tottenham, Twickenham, Wandsworth, West Ham and Westminster, and (2) the restrictions other than those relating to the sale of goods from vehicles now apply in additional streets in Croydon, East Ham and Wimbledon. Operative June 16, 1960. LONDON (WAITING AND LOADING) (RESTRICTION) (AMENDMENT) (NO. 3) REGULATIONS, 1960 (S.I. No. 993) (6d.).

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[*] Prepared by F. MAURICE DRAKE, *Barrister-at-Law.*

The following Order has been made detailing prescribed routes: S.I. No. 1036 (Ealing) (2d.).

The following Order has been made prohibiting waiting: S.I. No. 1035 (Chalfont St. Giles) (3d.).

The following Order has been made prohibiting cycling on footpaths: S.I. No. 891 (Chigwell) (3d.).

The following Order has been made relating to weight restriction: S.I. No. 825 (Ealing) (3d.).

Waiting is prohibited on certain extensive lengths of main carriageways of trunk roads in the London Traffic Area, subject to exceptions in cases of emergency or beyond the control of the driver, as set out in Regulation 4. The carriageways concerned are specified in the Schedule. Operative June 3, 1960. LONDON (PROHIBITION OF WAITING) (VARIOUS MAIN ROUTES) REGULATIONS, 1960 (S.I. No. 897) (3d.).

For penalties for contraventions see Regulation 6 of these Regulations.

A speed limit of 50 m.p.h. is imposed on the driving of mechanically propelled vehicles on lengths of trunk road in the London Traffic Area specified in the Schedule to the Regulations. Operative June 3, 1960. LONDON TRAFFIC (50 M.P.H. SPEED LIMIT) REGULATIONS, 1960 (S.I. No. 896) (3d.).

For penalties for contraventions see section 10 of the Road Traffic Act, 1930, as amended by section 2 (2) of the Road Traffic Act, 1934.

Police

These Orders relate to the superannuation of certain members of the civil staffs employed under the Commissioner of Police of the Metropolis and the Receiver for the Metropolitan Police District and members of the staffs of the Metropolitan Magistrates' Courts, and enable pensions payable to or in respect of such members of the civil staffs who are retired to be increased in the same way as those in respect of persons formerly in the civil service of the state may be increased under the Pensions (Increase) Act, 1959. Provision is made for the scheme for pensions for widows, children and dependants of members of the staff referred to above which was established by Parts I and II of the Metropolitan Police Staff Superannuation Order, 1949, to be extended, with modifications, to widows, children and dependants of former members of those staffs who have left for "approved employment," *i.e.*, approved by the Secretary of State for the purpose of the Metropolitan Police Staffs Superannuation (Approved Employment) Order, 1944. Operative June 3, 1960. METROPOLITAN POLICE STAFFS SUPERANNUATION (APPROVED EMPLOYMENT) ORDER, 1960 (S.I. No. 923) (3d.); METROPOLITAN POLICE STAFFS (INCREASE OF SUPERANNUATION ALLOWANCES) ORDER, 1960 (3d.).

Railways

Provision is made for the British Transport Commission to work the railway between Horsted Keynes junction and Sheffield Park station as a light railway, under the Light Railways Act, 1896, as amended. Operative June 15, 1960. BRITISH TRANSPORT COMMISSION (HORSTED KEYNES AND SHEFFIELD PARK) LIGHT RAILWAY ORDER, 1960 (S.I. No. 1022) (3d.).

For penalties for contraventions see Regulation 4 of the Order.

Rivers

Certain provisions of the Rivers (Prevention of Pollution) Act, 1951, are applied to the tidal waters of the River Exe and its tributaries as they apply to streams. The provisions applied are section 2 (prohibition on use of stream for disposal of polluting matter, refuse, etc.); section 3 (prevention and making good of defaults under section 2); section 4 (cleansing bed of stream, cutting vegetation, etc.); section 5 (by-laws); subsections (1) to (15) of section 7 (restriction on new outlets and new discharges). There is a saving in respect of discharges which are being made at present so long as there is no substantial variation. Operative June 22, 1960. RIVER EXE (PREVENTION OF POLLUTION) (TIDAL WATERS) ORDER, 1960 (S.I. No. 1024) (2d.).

For penalties for contraventions see sections 2, 3, 4, 5 and 7 of the Rivers (Prevention of Pollution) Act, 1951.

Road Traffic

The principal Regulations (S.I. 1957 No. 702) are amended by making further provision with respect to the particulars required to be furnished and the declaration to be made upon applications for excise licences for mechanically propelled vehicles. Operative June 17, 1960. ROAD VEHICLES (EXCISE) (PRESCRIBED PARTICULARS) (AMENDMENT) REGULATIONS, 1960 (S.I. No. 1014) (3d.).

New provisions are made concerning the periods for which an excise licence may be taken out for mechanically propelled vehicles and the duty payable in respect of a licence for any such period. As from October 1, 1960 a licence for any vehicle may be taken out for any period of twelve months, the rate of duty being the annual rate appropriate to the vehicle, and in the case of a vehicle for which the annual duty exceeds £3 a licence may be taken out for any period of 4 months, the rate of duty being one-third of the annual rate plus 10 per cent. of that amount, calculated in the case of 4-month licences to the nearest shilling. Operative October 1, 1960. ROAD VEHICLES (PERIOD LICENSING) ORDER, 1960 (S.I. No. 1023) (3d.).

Scotland

Rules have been made regulating the management of detention centres provided under the Prisons (Scotland) Act, 1952, and setting out the conditions governing the treatment and control of persons between fourteen and twenty-one years sentenced under section 19 of the Criminal Justice (Scotland) Act, 1949, to a term of detention, not exceeding three months, in a detention centre. Operative May 16, 1960. DETENTION CENTRE (SCOTLAND) RULES, 1960 (S.I. No. 870) (1s.).

The time during which particulars of germination of certain grass and clover seeds may be given to a purchaser by a seller of those seeds is extended for a period during 1960. Operative April 6, 1960. GRASS AND CLOVER SEEDS (SCOTLAND) GENERAL LICENCE, 1960 (S.I. No. 713) (3d.).

It is made illegal to use a sieve-net or any other net which is trailed or dragged along the bottom of the sea, for the capture of Norway lobsters within exclusive fishery limits off part of the east coast of Lewis. Operative May 18, 1960. SEA FISHERIES (SCOTLAND) BYELAW (No. 59), 1960 (S.I. No. 889) (2d.).

For penalties for contraventions see section 4 of the Sea Fisheries (Scotland) Amendment Act, 1885.

The provision of the by-law relating to the annual close time for the District of the River Sandwater, etc., (Shetland Islands) made by the Fishery Board for Scotland on February 8, 1883 and confirmed by the Secretary of State on May 5, 1883, are re-enacted in so far as that by-law relates to the annual close time for net fishing for salmon, and varied in so far as it relates to the annual close time for fishing for salmon by rod and line. Operative September 9, 1960. DISTRICT OF SHETLAND (ANNUAL CLOSE TIME) ORDER, 1960 (S.I. No. 890) (3d.).

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 11 New Fetter Lane, London, E.C.4." The questions of readers only are answerable in the Review. All questions should be submitted in triplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

71. *Taking and driving away—s. 28, Road Traffic Act, 1930*

Two youths "A" and "B" take and drive away a motor car without the consent of the owner or other lawful authority. They drive it for some time and eventually meet "C."

"C" inquires whether he might drive, and "A" and "B" agree. "C" then drives the car for a short distance, the others remaining in the area where they had been met by "C."

On returning to where "C" had met the others he finds they have left, so "C" abandons the car, joins his friends and they walk together to their respective homes.

Whilst "C" was driving the car he gives "D" a lift, the latter having no knowledge of the true owner of the car. "D" is seen to get out of the car and when the loss of the car is reported by the owner, inquiries are made and "A," "B" and "C" are arrested.

"A" and "B" are jointly charged with the original taking and driving away, etc., and "C" is subsequently charged with the same offence, but is dealt with separately, it being contended that when "C" took the car it was a second taking and driving away, etc.

"A" and "B" pleaded "Guilty" but on the advice of the court "C" pleaded "Not Guilty" and was subsequently defended.

The defending solicitor submitted that his client had no case to answer on the grounds that when "C" took the car over from "A" and "B" he had reason to believe the car was their property, and when they permitted him to drive he was doing so with lawful authority. Section 28, Road Traffic Act, 1930, was quoted and the defence solicitor concluded by saying, "If the court is satisfied that the accused acted in the reasonable belief that he had lawful authority the accused shall not be liable to be convicted." He added, "in this case the prosecution has failed to prove that the accused had taken the motor car without the consent of the owner or other lawful authority."

The prosecution submitted that the owner had given evidence that he had not given permission to "A," "B" or "C," and would not have done so if asked, therefore the onus was upon " C " to show he had acted legally.

The defence had contended that there was no shifting of the burden of proof. This submission was upheld by the court and " C " was acquitted.

If then, this is a correct interpretation of the law, it would seem that when a person takes and drives away a motor car without the consent of the owner or other lawful authority, all that he need say to guarantee dismissal is that the permission to drive was given by some other person whether fact or fiction, despite the fact that the prosecution has discharged its duty by bringing forward evidence that the legal owner of the vehicle had not given permission. [E. T.]

ANSWER

" In view of the very recent decision in *D.* (*an Infant*) v. *Parsons* [1960] 2 All E.R. 493, decided by the Divisional Court on a Case Stated on May 19th this year, I think that C would clearly be entitled to an acquittal on the ground that he was not a party to the original illegal ' taking ' of the motor-car, and I do not think the driving of the car by C at A and B's invitation constitutes a separate ' taking.'

" If the facts of the case put forward in the above question were slightly different, so that there was evidence to show that C arrived on the scene to find A and B about to drive the car, but not yet having taken it, then the problems posed above could still arise.

" In this event, if C asked permission of A and B to drive and then himself drove the car away he would clearly have taken the car without the consent of ' the owner thereof or other lawful authority ' and his only defence would be that provided in section 28, namely that the court (or jury) would have to be " satisfied that the accused acted in the reasonable belief that he had lawful authority."

It would, I think, be open to the court to find this without C having necessarily to give evidence, *e.g.*, " if, in all the circumstances of the case, the court could see no evidence pointing to C *not* believing that A and B were the true owners. But as, *ex hypothesi*, A and B were in fact in the act of committing a criminal offence it would only be in an exceptional case that the court would be likely to find this without hearing C give evidence. If C gave evidence that he honestly believed A and B to be the owners or to have lawful authority to give him permission to drive the car the case would be decided on whether or not the court accepted C's evidence.

" In any event on the facts set out in the above problem the submission of C's defending solicitor were manifestly wrong since the prosecution *had* proved, by the evidence of the owner, that C had no consent of the true owner. The defending solicitor should have called C to say that he honestly believed A or B was the true owner and that he saw nothing suspicious in the surrounding circumstances to put him on his guard. It would then be open to the court to acquit C if they believed him but to convict if they disbelieved him.

" Finally, the conclusion drawn in the final paragraph of the question is wrong. It is, of course, always open to the accused to *say* that some person, whether existing in fact or fiction, gave him permission to drive the car and that he believed he had lawful authority from that person to do so. But his acquittal will not automatically be guaranteed, and will follow only if the court after hearing his evidence and hearing him cross-examined believe he is telling the truth. If the story is fictitious it is of course more than probable that he will be disbelieved and convicted." [F. M. D.]

72.—*Informations under the Vagrancy Acts*

The proprietors of a coffee bar and restaurant in this district are alleged to have taken to providing entertainment for their customers in the form of a performance by a woman in the nature of a strip-tease. Witnesses to this performance will say that her actions after removing her clothing are disgustingly indecent.

The police have sought to lay informations against the man and wife who are proprietors of the establishment as follows:

1. Informations under a local Act charging an offence of exhibiting an indecent show in a place to which admission was obtained by payment of money.

2. Informations under section 4 of the Vagrancy Act, 1824, as amended by section 2 of the Vagrancy Act, 1838, for exposing to view in a certain building in a street called ——— a certain indecent exhibition.

The proprietors of the establishment will probably claim that the persons present at the performance were members of a private club, and that only members were permitted to be present.

My view of this matter is that whilst the informations under the local Act are unobjectionable in the form in which they are laid, the informations under the Vagrancy Act are bad.

The police rely upon the statement of the offence as set out at page 2493 of the 1960 edition of *Stone*: " Every person exposing to view in any street, road or highway, or public place, or in the window OR OTHER PART of any shop, or other building situate in any street, etc." They maintain that the words " or other part " extend to a room in the building, even though there is no suggestion in this particular case that the performance was visible outside the building, and it did in fact take place very late at night.

I feel that, in accordance with the general principles of interpretation of statutes, the words " or other part " must be read *ejusdem generis* with the word " window," and consequently would include apertures by which persons outside the building could observe the exhibition taking place inside, but that the general words would not be capable of an interpretation extending them to cover, in effect, any room inside the building whether or not the interior was visible from the street. [D. E. H. G.]

ANSWER

In my view the short answer to the charge under section 4 of the Vagrancy Act, 1824, is that the facts do not disclose that the indecent exhibition has been exposed to view in a part of the building which is " situate in any street, road, highway, or public place." In my opinion the construction of the section is clear, and the offence charged must either have occurred actually in the street, road, highway or public place (under section 4 of the Vagrancy Act, 1824) or, by the amended wording put in by section 2 of the Vagrancy Act, 1838, in the window or other part of any shop or other building *situate in* any street, road, highway or public place. The misconstruction of the person laying this information is to construe the section as if it referred to any part of a building, which *building* is in a street, etc. The correct construction is, in my view, any part of a building which *part* is in a street, etc.

Not only do I think that this is the proper construction, but I think it clearly falls in with the intentions of the Act which was not designed to prevent indecent acts or exhibitions within the closed walls of a room in any building. [F. M. D.]

Letters to the Editor

Mr. Sutterthwick's Court—two "suspects"

Sir,

I refer to the interesting article on suspect persons at p. 461, *ante.* At p. 465 counsel makes the point that a departmental store may not be a place of public resort within the meaning of the Vagrancy Act, 1824, s. 4. Mr. Jones, however, having raised this Aunt Sally, does not knock it down but goes round it because he does not make counsel proceed with the argument. It might interest your readers to know that a departmental store would, on the authorities, almost certainly be deemed to be a place of public resort. In *Sewell* v. *Taylor* (1859) 23 J.P. 792 it was held that a private house and garden where a public occasion took place was for the time being a place of public resort within section 4, and it was said that the term was not confined to places which are permanently open to the public. It is submitted that this case shows that a departmental store, when open, would almost certainly be within the Act.

I was rather surprised at the magistrate's decision to dismiss the charge against the female suspect as soon as the police officer said that he could not be absolutely sure of her intention to steal. Naturally the magistrate can stop the case at any time, but the article suggested that he stopped it because the witness had expressed his opinion to the effect given. Surely it is the magistrate's view of the evidence and not the witness's which is the deciding factor, and the magistrate would have been entitled to continue with the case and even convict notwithstanding the policeman's answer.

I am sure that Mr. Jones is perfectly aware of both points I have made and I mention them only because some readers might be puzzled by the first point and the less experienced ones misled by the second. I do not impugn for one moment the soundness of the law demonstrated in the name of Mr. Sutterthwick.

Yours truly,

CAMBRIAN.

[A. E. Jones writes: As your correspondent surmises, I was aware of *Sewell* v. *Taylor* and I agree that it would support the argument that a departmental store is "a place of public resort" within the meaning of the Vagrancy Act. I do not feel, however, that it is conclusive on the point. It was a case which was fought solely on the issue whether such a place had to be permanently public or whether private premises could be brought temporarily within the Act. The Court of Common Pleas had no difficulty in deciding that the latter view was the correct one, Erle C.J. remarking "The object is simply to protect the public when collected in large assemblies, and the permanency of such assemblies is, I think, quite immaterial." However, it is to be noted that counsel for the appellant, in the course of his argument, said "A shop might equally be called a place of public resort" in a context which indicated that he considered that to be such a ridiculous proposition that there was no danger of the court's accepting it. Erle C.J. did go out of his way to mention meadows in which races were held, churches and theatres as possible places of public resort within the Act but he did not take up the challenge with regard to shops. My own view, for what it is worth, is that the matter must be decided on the facts disclosed by the evidence in each case—which is rather what Mr. Sutterthwick indicated to counsel.

With regard to your correspondent's other point, I agree that the magistrate would have been entitled to continue the case and even convict notwithstanding the policeman's answer. But it would surely have been unwise, and even unjust, to do so, unless the facts were incapable of any explanation except criminal intent. An innocent explanation had been suggested to the officer and, after considering it, he had felt himself unable to say he was still sure of the defendant's guilt. If he, an experienced officer who actually saw everything she did, was ultimately doubtful of her intentions, how could the magistrate reasonably be certain? And if he was not certain it was his duty to acquit.]

Books and Periodicals

Book reviews:

Road Transport Law. By Kitchin. London: Iliffe & Sons Ltd. Revised by E. K. Wenlock. 12th ed. 13s. 6d.

A book which, in 124 pages, aims, as this one does "to enable the layman easily to understand the various Acts and Regulations affecting the construction, equipment and operation of vehicles" proposes itself the task of compressing the raw materials of a multi-course meal into a small and digestible pill. The authors have not shirked this task by omitting some of the raw material. Every statute and statutory instrument affecting the use of motor vehicles receives mention—as also does the common law. This involves touching on topics so diverse as cruelty to animals, wireless telegraphy, elections, weights and measures, purchase tax, education, labour conditions, food hygiene, explosives and pest control.

There are a few omissions of matters directly concerning the use of motor vehicles; notably, the prohibition of dangerous parts and accessories; the requirement that a driver shall be in a position to have proper control of the vehicle; and the alternative of giving security instead of taking out insurance against third party risks. The process of condensation leads also, inevitably, to some statements of law which are inaccurate from a lawyer's point of view; *e.g.*, that a driving licence "must be produced when required by the police." Fortunately, such over-simplifications are not likely to lead the reader into conflict with the law. But, in two instances, the law is mis-stated in important particulars: it is not true that "no vehicle can be removed solely on account of its obstructing other road users, unless a constable considers it to be too near a road junction or too far from a kerb "; and the qualifications given for obtaining a driving licence read as nonsense because the provisions of section 16 (3) of the Road Traffic Act, 1956, have not been taken into account.

These are, however, small blemishes on what is, in general, a well-planned and well-executed work. Its arrangement in short sections, with some duplication of material, makes for easy reference. It should be particularly valuable to the commercial vehicle owner who desires acquaintance with his legal obligations in respect of motor vehicles, their loads and their use on the road. Its usefulness to the legal practitioner would be mainly as a guide to the Acts and Regulations in which to find the law relating to any particular matter of road transport practice which he had occasion to investigate.

A. E. JONES.

Books received :

The English Prisons. By D. L. Howard. Methuen, London. 1960. 160 pp. (12 pp. Appendices). 21s. net.

General Principles of Criminal Law. 2nd ed. By Jerome Hall. Bobbs Therrill, Bloomington, Indiana. 1960. xii. 642 pp. (including index).

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1960

Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review,* 11 *New Fetter Lane, E.C.4. Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

THE
CRIMINAL LAW
REVIEW

September 1960

The British Academy of Forensic Sciences

The first scientific and general meeting of the British Academy of Forensic Sciences was held on July 22 and 23 at the London Hospital Medical College. The first session was devoted to education and training, C. H. Johnson (Secretary of the Police Surgeons Association) stressed the need for proper training of police surgeons in this country, Dr. R. I. Milne spoke of the problems of coroners and pathologists in relation to the forensic sciences, papers were also given by Dr. Robert Hausman on problems in the United States, and Mr. L. Oldham on forensic mechanical engineering. At the second session papers were given on research and investigation. The speakers included Dr. F. G. Tryhorn, who spoke of the Home Office Forensic Science Laboratories in the past and the future, and Mr. R. L. Jackson, who spoke on the facilities available to the police and the defence.

The most interesting session for readers of this journal is probably the third, at which Dr. Curran gave a paper on the problems relating to psychiatric evidence given in the Law Courts and questions of professional privilege. He drew attention to the fact that solicitors will importune psychiatrists until they find one who will give the kind of evidence that they want. Mr. E. Mathews showed how the present position unduly favours the prosecution, when material is required from the Home Office Forensic Science Laboratories. Although reports of the laboratories are available to the defence, any inferences drawn by the staff are not. The defence can submit material for analysis but a request has to be made through the police, and the report is readily available to them. Mr. F. Lawton, Q.C. modified the violence of this attack when he said that in his experience (twenty years of practice) no request for the information had been met with anything but every possible assistance. The full reports of the meeting will appear in the Academy's own journal which will commence publication later this year. Supporting the work started by the Academy a joint committee on medical evidence, consisting of representatives of the B.M.A., the Bar Council, and the Law Society, has now been set up to consider these problems. Their terms of reference are "To consider and report on the whole question of the presentation of medical evidence to courts of law and tribunals including (1) the gathering and availability of such evidence, (2) the availability of medical witnesses, and (3) questions of professional confidence."

The members of the committee are Dr. Michael Ashby, Dr. F. E. Camps, Dr. Desmond Curran, Mr. H. H. Langston and Dr. S. Noy Scott, Mr. H. Osmonde-Clarke, representing the Association, Mr. F. H. Lawton, Q.C., Mr. Patrick O'Connor, Q.C., Mr. Roger Ormrod, Q.C. for the general council of the Bar, and Mr. A. C. Prothero, Mr. F. C. Stigant, Mr. E. A. Williams, Mr. K. J. H. Nichols, for the Council of the Law Society, Dr. J. D. J. Havard and Mr. E. J. T. Mathews were appointed joint secretaries. Mr. Langston was elected chairman.

New methods of dealing with crime

Speaking at the opening session of the Second United Nations Congress on the prevention of crime and the treatment of offenders, the Lord Chancellor, Lord Kilmuir, said that he foresaw the need for a completely new approach to the problem. Discussing the Government's decision to give effect to some of the proposals in the White Paper on Penal Practice [1] he said: "Our object is not only to keep young offenders out of prison but to provide methods of dealing with those in need of fairly long-term training. . . ." Short term imprisonment for the seventeen to twenty-one age group would, he said, virutally disappear, with the exception of those who had already been to a Borstal. The plan seems to be to introduce short, very sharp, periods of punishment as a deterrent: detention in a detention centre will replace sentences of imprisonment of up to six months: for sentences of six months to three years a period of Borstal training will be substituted for imprisonment.

Sir Charles Cunningham, Permanent Under Secretary of State at the Home Office, subscribed to the view that a well informed and sympathetic public was one of the most important factors in the prevention of crime. Social condemnation, he said, would be one of the most effective deterrents we possessed.

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[1] Penal Practice in a Changing Society: Cmnd. 645.

A depressing picture of crime

The annual crop of reports published at this time of year presents a depressing picture of crime in this country. The greatest problem as shown in the *Criminal Statistics 1959*,[2] seems to be the serious lack of a sufficient number of police to control and deter criminals. It is to be hoped that the Royal Commission will be able to find some method of bringing the police forces of this country at least up to establishment. The number of indictable offences known to the police in 1959 was nearly 8 per cent. more than in 1958 but the number of persons found guilty was only 4·4 per cent. higher than in 1958. A slightly more cheerful aspect of the Report is that the number of males under fourteen found guilty of indictable offences in 1959 was less than the number found guilty in 1958, in spite of an increase in population. The largest increase in crime was in the twenty-one to thirty age group; the number of males found guilty of indictable offences in 1959 was 9·4 per cent. higher than in 1958. This a black picture indeed, but when these figures are compared with those for the fourteen to twenty-one age group, an increase of 5·7 per cent., one realises that the delinquents of former years are getting older, and the trend does not seem to be carrying on in younger generations. The number of murders committed in 1959 showed an increase over 1958, although they did not reach the very high rate of 1957. There was a decrease of 2 per cent. in the number found guilty of malicious damage to property, but this was the only indictable offence to show a decrease. There was a large increase, 6·5 per cent., of persons found guilty of traffic offences. However, the number of persons found guilty of offences relating to prostitution fell by 37·2 per cent., which is some proof at least of the efficacy of the Street Offences Act, 1959, in driving prostitution off the streets.

The Criminal Statistics for Scotland, 1959,[3] also show a serious increase; the number of crimes made known to the police in 1959 was 5·8 per cent. higher than the figure for 1958. There was a big increase in crimes of violence against the person and also in all road traffic offences, the number of cases of drunk when driving or drunk in charge increased by 18 per cent. The *Reports of the Commissioner of Police of the Metropolis*[4] and *Her Majesty's Inspectors of Constabulary*,[5] for 1959, tell very much the same story—a police force deficient in numbers, but doing a very good job in spite of it. The authorised male establishments in England

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[2] Cmnd. 1100.

[3] Cmnd. 1024.

[4] Cmnd. 1106.

[5] H.C. 257 (for. 1958–59).

and Wales showed a deficiency of 3,321 at the end of 1959, this is off-set by the increasing number of women and civilian personnel being used. It is to be hoped that the much debated traffic wardens will be able to take a certain amount of work off the shoulders of the police. The greater part of the Report is devoted to the many problems relating to road traffic. The figures for larceny of cars for 1959 were 9,171 as compared with 3,908 in 1958, and for the offence of "unauthorised taking" (removing any car which is returned or found within 48 hours) they rose from 6,080 in 1958 to 12,504 in 1959. This is an astounding increase and it is to the credit of the police and the special branch of the C.I.D. set up in 1955 to deal with these particular problems, that 20,127 of those vehicles were eventually returned to their owners, while 1,500 disappeared completely. Both reports refer to the great increase in the use of police dogs, and to the tremendous help they are to the police, this is particularly interesting in the light of the decision in the Scottish case *Patterson* v. *Nixon*[5a] in which evidence of the behaviour of a tracker dog was allowed. *The Report of the Commissioners of Prisons for 1959*,[6] shows an average increase of about 1,000 in the prison population for 1959. The overcrowding problem is still pressing, and is causing discontent because prisoners are perforce having to be moved away from their wives and families. Various new schemes such as group counselling and the hostel system started in 1958, are proving very successful. The Governor of Dartmoor has reported that approximately one hundred men were indulging in group counselling by the end of 1959. Pre-release courses are now being given at most prisons, and in addition the system of hostels for prisoners with sentences of more than four years, has been taken up by eight prisons. The general principle of these hostels is that the prisoners pay for their board and lodging, although they are still in custody, and for the maintenance of their wives and families if they have been living on national assistance, some money is allowed for out-of-pocket expenses. This seems to make the transition back to ordinary life less harsh and easier to cope with.

Special issue on violence

The enormous increase in violence of all kinds over the last few years, has led us to devote a whole issue to this particular problem. This will be published next month and will include articles by Herschel Prins on the Social and Family Aspects of

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[5a] See *post*, p. 634.

[6] Cmnd. 1117.

Violent and Aggressive Crime, Dr. T. E. James on Crimes of Violence and the Sentencing Policy of the Courts, Gordon Hawkins on the Treatment of Violent Criminals, and Captain Athelstan Popkess on the Racial Disturbances in Nottingham.

The British Journal of Criminology

We welcome the publication of the *British Journal of Criminology* (formerly the *British Journal of Delinquency*) under its new name and aegis. The editorial assures readers of the *Journal* that no change in scientific policy is foreshadowed by the change in title, however they hope, they say, to speak to a wider audience. Some of the changes are the inclusion of a feature, Current Survey, to take the place of the Notes and Criticism, this will cover a wider field and will include a very useful calendar of research, Research and Methodology, giving the research projects being carried out in different parts of the world at any one time. The section devoted to book reviews is large and well set out, a special section at the end is devoted to a comprehensive list of articles, books and papers covering all fields of criminology.

For the future there are two major series of articles to come; Modern Prison Architecture and Problems of Remand Homes, and a number of articles by well known criminologists. It seems that the *British Journal of Criminology* will continue to achieve its aim of " promoting research into the diagnosis, etiology, treatment, and prevention of crime " even more successfully than as the *Journal of Delinquency*.

Road Traffic

The Road Traffic Act, 1960, and the Road Traffic and Roads Improvement Act, 1960, both came into force on September 1. We are therefore publishing an article in this issue by Mr. K. C. Clarke[7] to explain the position under the new Acts. Other Acts that received the Royal Assent in July were the Betting and Gaming Act, The Clean Rivers Estuaries and Tidal Water Act, and the Mental Health Scotland Act.

Judicial appointments

Herbert Bewick, Esq., has been appointed to be Deputy Chairman of the Court of Quarter Sessions for the County of Durham.

Joseph Arthur Grieves, Esq., Q.C., has been appointed Recorder of the City of Birmingham.

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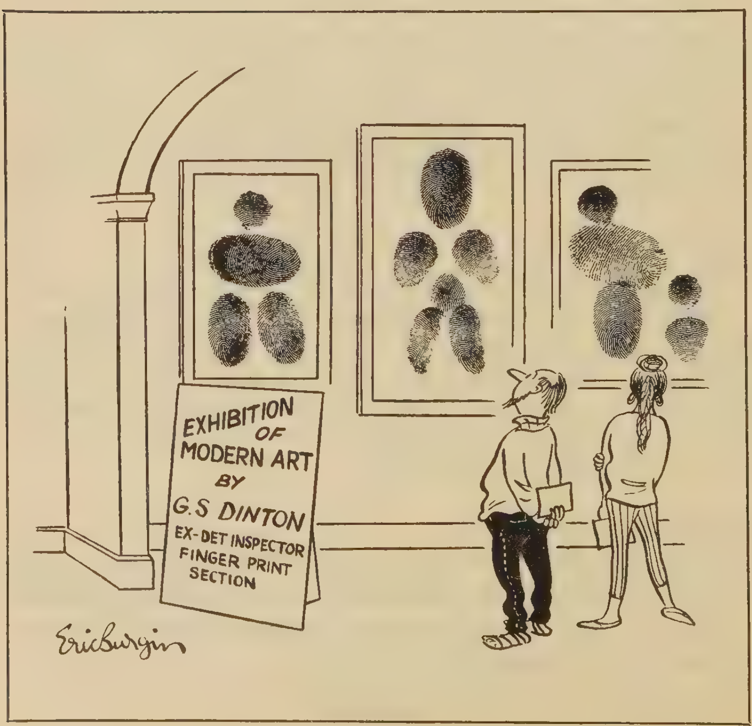
[7] *Post*, p. 591.

William Lloyd Roots, Esq., Q.C., has been appointed to be Deputy Chairman of the Court of Quarter Sessions of the County of Dorset.

Drunk in charge

An engineer in Durban—not Dublin—has been fined £30 for being found drunk in "charge" of a *floating dock*, *New Statesman*, August 6, 1960.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Eric Burgin

The New Road Traffic Legislation

By Keith C. Clarke

Assistant Prosecuting Solicitor, Essex County Council

The Road Traffic Act, 1960

This Act, which received the Royal Assent on March 22, 1960, is " an Act to consolidate, with corrections and improvements made under the Consolidation of Enactments (Procedure) Act, 1949, certain enactments relating to road traffic." The purpose of the Act is therefore limited and upon reading through it one immediately has the impression that the legislature have succeeded in attaining their objective. A large number of Acts dealing with various aspects of road traffic have been consolidated in one measure and, although the 1960 Act does not deal with any novel matters, a good many improvements in drafting have been made so that reference has been simplified and certain things set out in a clearer and more attractive manner.[1] There is no doubt that once the practitioner becomes accustomed to this Act he will find it very convenient for quick reference. For instance, he will no longer have the task of thumbing a dozen pages to remind himself of the penalty for a particular offence because in most cases the penalty appropriate to the offence has been set out in the section dealing with it. Again, there will be found a most useful table in the Eleventh Schedule relating to offences which involve disqualification for holding or obtaining, and endorsement of, driving licences.

The Eighteenth Schedule contains a list of enactments which are repealed and an examination of this Schedule will make clear the fact that only " certain enactments " relating to road traffic have been repealed and consolidated in the new Act. The Act makes no claim to embody all the existing legislation relating to road traffic and so, for example, one will still be obliged to refer to the Road Transport Lighting Act, 1957, and the Vehicles (Excise) Act, 1949, for matters within the scope of those measures. However the consolidated enactments do include the Road Traffic Acts of 1930, 1934, 1937 and 1956, and the London Traffic Act, 1924.

Transitional provisions are to be found in the Nineteenth Schedule to the Act. The most important measure in this respect is that orders and regulations, etc., which were made, etc., under legislation repealed by the 1960 Act and which could have been made under a corresponding provision of the new Act will now have effect as if they were made under that provision. Thus, the Motor Vehicles (Construction and Use) Regulations, 1955, the Pedestrian Crossings Regulations, 1954, and a host of other regulations and orders which were made under legislation repealed by section 267 (1) and the Eighteenth Schedule of the new Act are saved.

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[1] *e.g.*, s. 97 (1) of the 1960 Act, which replaces s. 9 (1) (2) and (3) of the Road Traffic Act, 1930 (as amended), now sets out the minimum ages for driving motor-vehicles in tabulated form.

The Act comes into operation on September 1, 1960, with the exception of certain provisions specified in Part I of the Twentieth Schedule, which will come into operation in accordance with the provisions of Part II of that Schedule.

It is illustrative of the pace of modern legislation that, before the provisions of one Act have come into operation, two other Acts have received the Royal Assent amending the provisions of the first statute. This has happened in the case of the Road Traffic Act, 1960, and we will now examine the extent to which two recent measures have amended it.

The Road Traffic (Amendment) Act, 1960

This Act received the Royal Assent on July 29, 1960. Its sole object is to amend section 99 (1) of the Road Traffic Act, 1960,[2] so that a person will now be able to obtain a driving licence if he satisfies the licensing authority that within the period of ten years, ending on the date when such licence is to take effect, he has held a licence to drive a vehicle of the class which he wishes the new licence to cover granted under a law for the time being in force in Northern Ireland, the Isle of Man or any of the Channel Islands which corresponds to Part II of the Road Traffic Act, 1960. The previous licence must not have been in the nature of a provisional licence and the applicant must not be disqualified under the relevant external law for holding or obtaining a driving licence.

The Road Traffic and Roads Improvement Act, 1960

This Act received the Royal Assent on July 29, 1960. Sections 1 and 2 contain the long debated provisions about " ticket fines " and traffic wardens respectively and the following parts of the Act affect the Road Traffic Act, 1960:

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[2] Under s. 99 (1) of the Road Traffic Act, 1960, a driving licence will not be granted to a person unless he satisfies the licensing authority that, within the last 10 years, he has either passed the driving test, or held a licence (other than a provisional licence) to drive vehicles of the class which he wishes the new licence to cover.

Sections 3 to 7: Parking places on highways where charges are made

The powers of the Minister of Transport with respect to the making of designation orders under section 85 of the Road Traffic Act, 1960,[3] are temporarily, and in some cases permanently, enlarged by virtue of sections 3 and 4 of this Act. For instance, for the next five years, the Minister does not need to refer applications or proposals for a designation order in the London Traffic Area to the Home Counties Traffic Advisory Committee. Also, the existing power of the Minister to make designation orders in the London area on his own motion with a view to experiment or demonstration is now replaced by a power, exercisable for the next five years, to make such orders in cases where he considers that parking places should be designated in that area.

Section 5 deals with designation orders outside the London Traffic Area and provides that such orders made by virtue of section 85 (8) or (9) of the Road Traffic Act, 1960, may now include provisions—

(i) for any of the purposes for which a traffic regulation order outside the London Traffic Area may be made under section 26 (3) (*a*) to (*c*) of the Road Traffic Act, 1960, *e.g.*, requiring traffic to proceed in a specified direction and prohibiting or restricting waiting or the loading and unloading of vehicles;

(ii) for authorising the use of any part of a road as a parking place for vehicles without charge and subject to any specified conditions and for removing from any place so authorised a vehicle left there in contravention of the order.

Any designation order which makes provision for any of the purposes referred to in (i) *supra* may revoke or vary a subsisting provision made for those purposes in a traffic regulation order under section 26 of the Road Traffic Act, 1960, and the contravention of any such provision in a designation order carries with it a penalty.[4] A penalty is also incurred for the contravention of, or non-compliance with, a provision in a designation order under (ii) *supra.*[5] Section 88 of the Road Traffic Act, 1960,[6] will not apply to contraventions of, or failures to comply with, provisions in orders having effect by virtue of section 5 of this Act.

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[3] Under s. 85 the Minister is empowered to designate, by an order, parking places where charges are made on highways in the Metropolitan Police District or the City of London. S. 85 (8) and (9) contains machinery for extending the principal provisions of this section to other areas in England, Scotland and Wales.

[4] Fine not exceeding £20 or, on a second or subsequent conviction, not exceeding £50, *i.e.*, the same penalty which is incurred under s. 26 (7) of the Road Traffic Act, 1960, for contravening a provision in a traffic regulation order.

The Minister is now empowered to make provision for enabling designation orders to be made by local authorities in respect of areas outside the London Traffic Area instead of being made by him (s. 5 (7)).

Section 6 removes a difficulty with regard to excess charges shown on a parking meter (the " yellow flag " charge of 10s.). A motorist who had not paid an initial charge could (and in some cases did) contend with perfect logic that he could not be liable to an *excess* charge. The only result of this was that the motorist had to be prosecuted for failure to pay the initial charge. Subsection (1) overrides the logical difficulty and enables the local authority (or Minister) to accept the excess charge although it is not due because the initial charge has not been paid. Under subsection (2) when a parking meter shows a red flag, this may be accepted by the court as prima facie evidence that an offence has been committed and that an excess charge was incurred. Section 7 deals with the right to challenge designation orders in legal proceedings and imposes a limit of six weeks on the period during which the validity of such orders may be questioned in those proceedings.

Sections 8 and 9: London Traffic Regulations, etc.

Section 8 enlarges the powers of the Minister of Transport with respect to the making of regulations for controlling or restricting traffic on roads within the London Traffic Area under section 34 of the Road Traffic Act, 1960. For example, the power to make such regulations may, within the next five years, be exercised without previous reference to the London and Home Counties Traffic Advisory Committee and reference to " traffic " in section 34 will now include references to foot passengers. Regulations may now provide for the display of devices indicating when a vehicle arrived at, and when it ought to leave, a place in a street where waiting is restricted. Appeals to the Minister from the Traffic Commissioners under sections 135 (8), 141 (4) and (6) and 143 of the Road Traffic Act, 1960, are not now permitted in certain special cases.

The Minister is given powers under section 9 relating to the placing of traffic signs and bollards and the adjustment or replacement of light signals in the London Traffic Area for the purpose of implementing traffic regulations and controlling the movement of traffic.

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[5] Maximum penalty of £5, or £10 on second or subsequent conviction.

[6] This section penalises contraventions of, or failures to comply with, orders relating to parking places on highways where charges are made.

Sections 11 to 16: Parking accommodation and traffic regulation in London area and elsewhere

These sections deal with a host of administrative matters. Subsections (1) to (7) of section 11 amend section 81 of the Road Traffic Act, 1960, which relates to the power of a local authority outside London to provide parking places off the street or, without payment, on the street. Subsections (4), (5), (7), (8) and (10) of section 81 of the last-mentioned Act [7] are repealed and a local authority may, in respect of a parking place provided by them under that section, make an order dealing with the use of that parking place covering such matters as the vehicles entitled to use it, the conditions upon which it may be used, the charges to be paid for such use (if off the street) and the removal and safe custody of vehicles left there in contravention of the order. Such an order may, subject to ministerial approval, provide for the use and control of apparatus to determine when a vehicle arrived at and when it should leave a parking place and also apparatus in the nature of a parking meter in the case of an off-street parking place. These orders made by the local authority are subject to variation or revocation by the Minister and persons disobeying them are penalised [8] as are also those who interfere with apparatus for collecting charges at an off-street parking place.[9]

By virtue of section 11 (8) and (10) certain local authorities may now make orders jointly under sections 26 and 81 of the Road Traffic Act, 1960, for the purpose of a general scheme of traffic control in a stated area, subject to ministerial confirmation.

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[7] Subss. (4) (5) of s. 81 of the Road Traffic Act, 1960, required the local authority to publish a notice of proposals to establish a car park. A " person aggrieved " had the right to appeal to the magistrates (in Scotland to the sheriff). In lieu thereof, s. 29 of the Act is applied to the making of orders under s. 81 and the Minister is given power to revoke, vary or amend an order of a local authority after holding a local inquiry if he thinks fit: see the Road Traffic and Roads Improvement Act, 1960, s. 11 (7) (12).

Subss. (7) (8) of s. 81 of the Road Traffic Act, 1960, gave power to make by-laws (in Scotland regulations) and subs. (10) applied ss. 6, 7 of the Public Health Acts (Amendment) Act, 1907, to offences under by-laws and to offences under subs. (9) of s. 81 of the Act of 1960. Alternative provision is made by s. 11 of the Road Traffic and Roads Improvement Act, 1960.

[8] Maximum penalty—first conviction £5; second or subsequent conviction £10.

[9] Maximum penalty—£50 fine, or three months in prison, or both.

Since such orders are not to be subject to the limitations imposed by section 26 (4) and (5) and section 81 (2) (*a*) of the Road Traffic Act, 1960, it follows that their provisions may have the effect of preventing or restricting access to premises from a road or creating a nuisance. The powers contained in section 81 of the last-mentioned Act and section 11 of this Act relating to the making of orders by local authorities are, in so far as they relate to off-street parking places, extended to local authorities in London (s. 11 (13)).

Section 13 gives to local authorities additional powers in connection with the provision of off-street parking places under section 81 of the Road Traffic Act, 1960. For example, a local authority may now provide parking places in, and erect, maintain and manage, buildings used also for other purposes subject to proposals made to the Minister of Transport and approved by him within the next five years. [Local authorities which have provided off-street parking places are enabled, under section 14, to enter into an arrangement with a person whereby he is authorised to collect and retain the parking charges in return for a lump sum payment by him to the authority.]

It is provided by section 15 that, where a vehicle is removed from a parking place or road in pursuance of an order, or regulations, mentioned in subsection (1),[10] charges shall be paid by the person prescribed by the Minister of Transport to the appropriate authority specified in subsection (4). These charges are:

(i) a fixed amount of £2 or such other sum as may be prescribed by the Minister in respect of the removal of the vehicle; and

(ii) a charge to be ascertained by reference to a scale prescribed by the Minister in respect of the period during which the vehicle is in custody.

Section 16 provides that the regulations and orders mentioned in subsection (1)[10] may contain provisions for authorising the authorities which are entitled to receive charges under section 15 to sell or otherwise dispose of vehicles which appear to them to have been abandoned and to apply the proceeds of sale towards satisfying the costs of disposal and any charges to which they are entitled under section 15. This power of disposal will not be exercisable unless such period has elapsed (not being less than six weeks) and such steps have been taken as will afford an adequate opportunity for enabling the vehicle to be claimed.

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[10] *i.e.*, regulations under s. 43 of the Road Traffic Act, 1960, orders under s. 87 (8) of the last-mentioned Act and s. 11 (2) of this Act, and orders containing provisions having effect by virtue of s. 5 (5) of this Act.

Sections 17 to 19 of the Act contain temporary provisions for road improvement, and section 22 contains certain financial provisions. Minor and consequential amendments to various sections of the Road Traffic Act, 1960, are clearly set out in the Schedule.[11] No provision contained in regulations made, or having effect, under section 64 (1) of the Road Traffic Act, 1960, which imposes or varies requirements with respect to the braking systems with which motor-vehicles must be *equipped* shall be taken to be a provision relating to the *construction* of vehicles for the purposes of section 64 (3) of that Act or any other provision of the regulations (s. 21).

The provisions of the Road Traffic (Amendment) Act, 1960, and the Road Traffic and Roads Improvement Act, 1960, come into force on September 1, 1960, with the exception of sections 11 (1) to (7), 13 (9) and (10) and 15 of the latter Act, which will come into force on a day appointed by statutory instrument.

Note: At the time of writing this article H.M. Stationery Office had not printed the Road Traffic and Roads Improvement Act, 1960. Details of this Act have therefore been prepared from parliamentary Bills and other information.

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[11] There is no list of repeals as such, but the following parts of the Road Traffic Act, 1960, will cease to have effect as a result of various provisions in this Act: ss. 91 (4) and (5), 82, 81 (4) (5) (7) (8) and (10), 34 (2) from and including the words "and, for the purposes," and in s. 26 (4) the words "if the restriction does not prevent loading or unloading for more than six hours in all in any consecutive period of twenty-four hours."

Statutory Powers of Search and Arrest on the Ground of Unlawful Possession

By GLANVILLE WILLIAMS, LL.D., *Barrister-at-Law*

"Unlawful possession" in the Metropolis

Although the police can arrest if they reasonably suspect a felony to have been committed, they have no general power to search before arresting. There is, for example, no universal rule under which the police can stop and search a person conveying goods that may reasonably be suspected to have been stolen or unlawfully obtained, if they do not first arrest him.

Particular powers are, however, given by some statutes, the earliest being the Metropolitan Police Act, 1839, s. 66. This provides that a constable may detain and search any vessel, cart or carriage in or upon which there shall be reason to suspect that any thing stolen or unlawfully obtained may be found, and also any person reasonably suspected of having or conveying such a thing. By section 69, persons apprehended without warrant under the Act are to be taken to the nearest station house, to be brought before a magistrate.

Powers of this kind are much valued by the police forces possessing them, and these forces use (or think they use) the powers extensively. It will be part of my object to show that many, if not most, purported exercises of the powers are probably illegal, and that the statutes create difficulties of interpretation, and introduce questionable changes in ordinary legal procedure, which call for reconsideration by the legislature.

The reasonableness of the suspicion

A person who is searched under the legislation need not be arrested,[1] so that the police may postpone a decision on the question of arrest until after they have completed their search. The way in which the police act has been thus stated.

> "Under the Metropolitan Police Act we have power, which, of course, if we abuse it too much would be taken away, to stop, search and detain anybody on suspicion of having committed a crime. We do stop several hundred thousand people

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[1] *Willey* v. *Peace* [1951] 1 K.B. at 97.

> a year in the streets, and we say to them: 'Look here, we are awfully sorry, there has been a lot of house or shopbreaking around here, would you mind showing us what is in your bag, because if you live around here you will be very pleased if the thief is caught.' We get practically no complaints at all (I believe thirty or forty complaints a year) so in this country the average person is really very willing to co-operate with the police. . . . One of the bases of our job is to be as friendly as possible with the public." [2]

The efficacy of this power as a matter of law depends very much on the readiness of the courts to uphold the police in their allegation that their suspicion was reasonable. If the attitude adopted by Lord Hewart C.J. in *Ludlow* v. *Shelton* [3] is followed, the power will not mean very much to the police. The facts of that case were that Mr. Ludlow was waiting for a bus in Kensington High Street, carrying an overcoat over his arm which he intended to take to his tailor's for attention. Two police officers, whom Mr. Ludlow described as wearing shabby civilian suits, and producing somewhat dirty cards which they described as warrant cards, demanded to know what he was doing with the overcoat. Since he refused to tell them, and proposed to board his bus in disregard of their questions, he was arrested. In an action for false imprisonment, Lord Hewart C.J. ruled that it was for him (and not for the jury) to determine the reasonableness of the constables' suspicion; he held that it was not reasonable, and £300 damages were awarded. It made no difference that, according to the defence, larcenies had been taking place from car parks and shops in the vicinity, including outfitting shops. "It is a perilous thing," said Lord Hewart in characteristic vein, "when great powers, with the knowledge of great force behind, are recklessly, foolishly, or over-zealously applied. If once one ceases in this country to value the liberty of the subject, if once signs are shown of giving way to the abominable doctrine that, because things are done by officials, therefore some immunity must be extended to them, what is to become of liberty?"

Although Lord Hewart's decision on the facts of this particular case may have no general and governing significance, it seems in one respect to imply an important principle. This is that a constable who has no reasonable suspicion before his suspect refuses to answer questions cannot assert that his suspicion becomes reasonable merely because of that refusal. A citizen who is improperly stopped by the police is entitled to refuse to answer their questions, and his refusal cannot be taken as itself a ground of suspicion.

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[2] R. M. Howe, *The Work of the Criminal Investigation Department* (Law Society, London, 1952), p. 8.

[3] *The Times*, February 3 and 4, 1938

In *Ludlow* v. *Shelton* the plaintiff had done nothing to invite the suspicion of the constables at the time when he was accosted, apart from the fact that he was carrying an overcoat. This perhaps makes a point of distinction from the later case of *Hamshere* v. *Bower*,[4] where a constable observed the plaintiff standing at the end of Earl's Court Road at about 7.30 on a Sunday morning. There were few people about; the plaintiff was looking up and down, and he was wearing corduroys, a rather dirty mackintosh, and had a bushy beard; there was a haversack on his back. When the officer approached, the plaintiff turned down the Earl's Court Road, walking rather rapidly. This was in fact a coincidence, but it aroused the officer's suspicions, particularly as there had been a number of thefts from cars. The officer stopped the plaintiff and asked him for his name and address, where he was going, and what he had in his haversack. The plaintiff was apparently neither searched nor detained, but he brought an action for false imprisonment. Streatfeild J. ruled that the suspicion was reasonable, and dismissed the plaintiff's action. It may be doubted whether on these facts there was an imprisonment at all.

It appears to be an inference from *Hamshere* v. *Bower*, and is indeed common sense, that a suspect who endeavours to escape the police (or is reasonably thought to be doing so) furnishes reasonable grounds of suspicion by so doing. A man is within his legal rights in running away from the police, just as he is within his legal rights in refusing to answer their questions (in the absence of specific statutory powers), but the former is only reasonably explicable on the hypothesis of guilt, while the latter is not. Thus the former is corroborative evidence for a search or arrest, while the latter is not.

What offence can be charged?

Suppose that the power to detain and search is validly exercised, and that a prima facie ground is revealed for arrest. The suspect can be arrested and in due course brought before a magistrate under section 69. The resulting power of the magistrate is set out in the Metropolitan Police Courts Act, 1839, s. 24: if the suspect when charged does not give a satisfactory account of how he came by the thing in question, he shall be deemed guilty of an offence.[5] (See also Stipendiary Magistrates Act, 1858, s. 7.) The enactment is stringently worded, for not only does it require the accused to answer, but it demands an account "to the satisfaction of such magistrate" and not merely a "reasonable" account. Moreover it gives little indication of what type of explanation will excuse.

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[4] *The Times*, February 10, 1955; [1955] Crim.L.R. 25.

The draftsmanship of section 24 is so peculiar that some space has to be taken to explain it.

It is sometimes thought that the suspect commits no offence under the section until he appears before the magistrate and fails to give a satisfactory account. However, this cannot be the meaning. The offence is not committed in court, when the failure to give the account takes place; it is committed on the street, when the goods are conveyed. If this is so, it has a consequence which is of some procedural importance, because it means that the police can validly charge the suspect with an offence under section 24 before he has appeared in court. The point arises if the police, having made the charge, proceed to admit the accused to bail, and he does not surrender at court. Since he has been validly charged with an offence, process can issue under the Magistrates' Courts Act, 1952, s. 97, which provides for the issue of a warrant to apprehend a person "charged with . . . an offence" who fails to surrender when released on recognisance. However, another legal opinion has it that the accused cannot be charged until he appears in court, since he does not commit an offence till then, in which case the police are helpless if the accused does not appear.

Suppose that a person when charged under section 24 says with complete frankness that he stole the thing, and gives details, so that the magistrate is satisfied that his statement is true. Can he be convicted under the section? Literally no, for he has in one sense given a satisfactory account of how he came by the thing. Presumably, however, it is intended that the magistrate will not feel satisfaction merely by hearing a true account, he will be satisfied but only by hearing an acount which is at the same time true and satisfactory to the criminal law. This is in fact the interpretation placed upon the section by the judges.[6] In other words, the suspect must show that he is not a party to the offence of stealing or unlawfully obtaining, or of receiving goods knowing that they have been stolen or unlawfully obtained.

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[5] It seems that this section applies not only if the suspect is arrested under the Metropolitan Police Act, but also if he is brought before the court by summons: *Hadley* v. *Perks* (1866) L.R. 1 Q.B. 444.

[6] *Fisher* (1875) 32 L.T. 22; (1875) 39 J.P. 612.

The ambit of "unlawfully obtained" is left vague. Is it confined to offences in the Larceny Act, or does it extend also to such things as rationing offences? There is no judgment of a superior court on the point, but during the Second World War metropolitan magistrates refused to hold that rationing offences came within the purview of the legislation, which they thought was confined to offences of theft and fraud.

It seems clear that the section does not create an offence of possessing or conveying stolen goods, if the accused did not know when he received them that they were stolen. If a person receives goods innocently, his subsequent knowledge that they have been stolen does not make him guilty of a crime, though he may be liable for the tort of conversion. The section is not apt to extend the criminal law; what it does is to shift the burden of proof, and exempt the prosecution from giving details of the crime charged.

The "conveying" of goods

The "detain and search" provision mentioned at the beginning of this discussion, namely, section 66 of the Metropolitan Police Act, 1839, makes the power exercisable against any person reasonably suspected of "having or conveying" the goods in question. These words are restrictively interpreted by the courts, since the first verb is held to take its colour from the second. It is not enough that the goods are possessed; they must be possessed for the purpose of being conveyed. Thus the legislation applies only where goods are suspected to be in transit. This was laid down in a case where it was held that the sections could not be used against the proprietor of a mill where sacks were found which were suspected of being stolen or illegally obtained.[7] Of course, if an offence is complete when a man is out of doors conveying goods, the fact that he is apprehended only when he has got back to his own premises does not help him.[8] It has even been held that a transit may be temporarily suspended without ceasing to be a transit in the eye of the law. This was in *Willey* v. *Peace*[9] where the facts were as follows. A constable of the Metropolitan Police reasonably suspected a man of loitering in the street with intent to commit a felony. The constable accosted the man, who abused him and said that he was going to the police station to complain. The constable accompanied him there but did not arrest him. At the police station the sergeant, knowing (as the constable did not) that a house in the neighbourhood had been broken into, and noticing that the man's pockets were bulging, suspected that he had stolen property in them, and asked him what he had there. The man refused to say, and he was forcibly searched. He had no stolen property on him. It was held by the Divisional Court that the search was lawful under section 66. Accepting the view that the section applied only to goods being conveyed, there was a conveyance in this case. "A man," said Lord Goddard, "having something in his possession as he walks along the street does not cease to be 'conveying' it if he walks into a police station with it still on him, and is going to walk out of the police station if the police let him go." The result of this decision is that neither the search nor even (as had previously been thought[10]) the suspicion need occur on the street or in the open; it is enough that the suspect is substantially in the course of a journey at the time.

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[7] *Hadley* v. *Perks* (1866) L.R. 1 Q.B. 444.
[8] *Fisher* (1875) 32 L.T. 22; 39 J.P. 612.
[9] [1951] 1 K.B. 94.

Although it has nothing to do with the point of law decided in this case, one may express grave doubt whether the action of the police in searching this man was properly held to be reasonable (as required by section 66). Any extension of police powers, however necessary in the public interest, needs to be accompanied by vigilance on the part of the courts to see that the limits of legality are respected. In this case, what reasons did the police have for suspicion? The man had behaved as though he were loitering to commit a felony—but loitering would seem to be far removed from the expeditious movements to be expected of a man who was conveying loot. Then he had voluntarily elected to go to the police station to make a complaint—a singular piece of bravado if he had property in his pockets that he had just stolen. A house in the neighbourhood had been broken into—but we are not told how recently, or whether the suspect was walking away from it when accosted, or precisely how near he was. The only other fact is given in the *All England Reports*, though omitted from the *Law Reports*: the sergeant "saw the appellant doing things which he regarded as an endeavour to conceal something."[11] We are not told what these alleged things were; and since in fact the appellant was innocent, one would think it unlikely that he did behave as though he was trying to hide articles.

Legislation for other areas

The precedent of the Metropolitan Police Act has been followed in other local legislation, including the Port of London Authority

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[10] By Shee J. in *Hadley* v. *Perks*, above.

[11] [1950] 2 All E.R. 724. This report introduces a police detective who is not in the *Law Report* version.

Act, 1917. Outside London, the police possess powers of this kind in six big provincial cities and two counties.[12] It also exists for the whole country under two statutes, though in both it is given a restricted ambit. The first is the Canals (Offences) Act, 1840, s. 11, which applies in this respect only when action is taken by a special canal or river constable. River and canal constables are no longer appointed, so this Act is only of historical interest. The other general statute is the Public Stores Act, 1875, s. 6, which is like section 66 of the Metropolitan Police Act except that it does not extend to all goods, applying only where there is reasonable suspicion of Her Majesty's stores having been stolen or unlawfully obtained; on the other hand the power of arrest is given not only to the Metropolitan police but to other constables who are authorised in writing by a public department. Section 7 of the Act is similar to section 24 of the Metropolitan Police Courts Act, save that as before it is confined to Her Majestys' stores.

Some of the local Acts show variations from this formula. Thus the Liverpool Corporation Act, 1921, s. 507 (1), (5), makes it an offence for a person to possess anything which there is reasonable ground to suspect has been stolen or unlawfully acquired or detained if he does not account to the satisfaction of the court for his possession of the same. Then section 573 gives the police power to arrest any offender against the Act whose name and address are unknown to the constable arresting and cannot then be ascertained by him. It will be seen that the power of arrest is in one respect narrower than in London, for it does not apply if the offender's name and address are known or can be ascertained.[13] On the other hand, it is wider in that it is not limited to goods in transit.

A point on the draftsmanship has given rise to doubt. Section 573 authorises the arrest only of a person who " shall commit any offence against " the Act; but it has been suggested that it cannot be known whether an offence is committed against section 507 until the accused is brought before a magistrate, for the offence is not committed (it is said) unless the accused then fails to account to the satisfaction of the court for his possession of the thing. This opinion was expressed by Viscount Simon in *Christie* v. *Leachinsky*[14]; and, if it is correct, the logical conclusion would seem to be that the power of summary arrest does not extend to an offence against section 573. Viscount Simon did not, however, draw this conclusion; he assumed that there was a power to arrest under the Act in order to bring the suspect before a magistrate. The same assumption was made by the Court of Appeal in *Dumbell* v. *Roberts*.[15] It is submitted that the true view is that the offence is committed by the fact that the defendant, being a person who has obtained goods by theft, false pretences, guilty receiving, or other similar offence, continues in possession of them. The provisions relating to giving a satisfactory account pertain only to the burden of proof at the trial, and are not an ingredient of the offence. There are numerous statutes shifting the evidential or persuasive burden of proof in criminal cases, but clearly they do not alter the ingredients of the offence, or have the effect of enacting that the offence is committed only in the court of trial. If this view is accepted, there is no difficulty in holding that the power of summary arrest applies.

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[12] (1949) 160 H.L.Deb., col. 855.

[13] *Dumbell* v. *Roberts*, 113 L.J.K.B. 185; [1944] 1 All E.R. 326; 170 L.T. 227; 60 T.L.R. 231; 108 J.P. 139 (C.A.).

[14] [1947] A.C. 573.

Proposals to take these powers in other areas now raise parliamentary opposition, partly because it is thought that they give too wide a discretion to the police, partly because it is undesirable that the powers of the police should vary widely from place to place.

The value of these provisions in relation to the powers of the police

Those police forces that possess "detain and search" powers attach great importance to them, and make (or think they make) considerable use of them; and yet it is not easy at first sight to locate the respect in which these powers make any significant addition to the ordinary powers of arrest under the Larceny Act for theft, false pretences or receiving.

As the powers are interpreted by the courts, the police must reasonably suspect an offence under the Larceny Act before they can detain and search, and they can only detain and search the person who is reasonably suspected to be the offender. This being so, why should they not act under the Larceny Act? They can arrest the suspect under that Act, and having arrested him can search him under the general power to search arrested persons. The only legal change made by the statutory provisions is that the police can search first and arrest afterwards, instead of following the normal procedure of arresting first and searching afterwards. But this is a benefit to the subject rather than to the police. Presumably, an innocent person would rather be detained, questioned, searched, and then perhaps released without arrest than arrested, questioned, and searched. It is not a difference that helps the police in any way.

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[15] Above, n. 13.

If this analysis is correct, the powers purported to be conferred by section 66 of the Metropolitan Police Act, 1839, and similar legislation, are illusory. They can perhaps be explained as dating from a time when it was not clear how far the police could search arrested persons. According to the decision in *Elias* v. *Pasmore*,[16] if that is correct, the police have a general right to search arrested persons, and so do not need specific statutory powers.

But, it may be said, there is a difference between the reasonable suspicion which justifies detention and search, and the reasonable suspicion which justifies arrest: the former may be of slighter degree than the latter. Certainly the police seem to act upon this assumption when purporting to exercise their powers, but it has not yet obtained judicial support. The question might have arisen in *Ludlow* v. *Shelton* (above) if the constable had used force against the plaintiff, instead of merely stopping him and asking him questions. It is difficult to see why the use of force to search should be justified on any slighter grounds than the use of force to arrest. Certainly there is no indication in the statute of such a distinction, for the statute requires that the constable should reasonably suspect the person he stops of being in possession of something stolen or unlawfully obtained. This reasonable suspicion would seem to be the same as is required for an arrest.

Even at common law, a policeman is perfectly entitled to arrest a person whom he reasonably suspects of being either a thief or a guilty receiver, though he cannot tell which. At the trial, if the prosecution is able to show that the defendant was in possession of the goods recently after their having been stolen, and he gives no reasonable explanation, the question may be left to the jury, who are at liberty to convict the defendant of being either the thief or a receiver, whichever they think is the more likely, and either verdict will be upheld. Thus it is not necessary for any of the purposes of arrest and charging that the police should have to decide between the hypothesis of theft and of receiving.

The conclusion submitted is that the legislation as to unlawful possession adds nothing of value to the powers of the police in respect of detention, search and arrest.

This position does not seem to be understood by the police, who apparently assume that they are empowered to search anyone whose behaviour is at all out of the usual, even though they have no solid grounds of suspicion. According to evidence given in

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[16] [1934] 2 K.B. 164.

Ludlow v. *Shelton*,[17] the police think they have well justified the exercise of their powers of intuition if they make one arrest for every twenty-five searches: it is not said how many of the persons arrested are afterwards convicted.

From the point of view of the police, the procedure enables them to control crime more effectively. The more people who are picked upon for a spot search, the more likely it is that wrongdoing will come to light. But this improvement in the enforcement of the criminal law is bought at the expense of an unknown number of lost trains, missed appointments, and other vexations, and some inevitable deterioration in the relations of police and public. It seems unlikely that Parliament, when it granted power to search on reasonable suspicion, intended the power to be used in this rather wholesale way.

The value of the provisions in facilitating conviction

If the legislation does not really add to the legal powers of search possessed by the police, does it reduce the number of facts needed to be proved in order to obtain a conviction?

At common law, and under the Larceny Act, a prosecution for larceny cannot be sustained except on proof that the goods charged as stolen by the defendant have in fact been taken from someone. They may be charged as having been stolen from a person unknown, but still they must be shown to have been lost by someone. If evidence of this kind cannot be given, there will be no case for the defendant to answer, and so he will never be called upon for an explanation, even though his conduct may have been extremely suspicious. An example is the case of *Joiner*,[18] where the defendant, a breeder of pheasants, left his cottage at 3.15 a.m. and returned three hours later carrying a sack containing eleven tame pheasants. On a prosecution for larceny, no one was called to prove that he had lost any live tame pheasants, and it was held that there was no case to answer.

Sometimes the embarrassment of the prosecution may arise from the impossibility of identifying the goods. There may have been many thefts of fungibles from different persons, any of whom can give evidence, but no one of whom can assert a belief that the particular articles found on the accused are his. Here, again, a defendant may submit that there is no case to answer. This was the reason why the Corporation of Blackburn sought to obtain from Parliament powers to arrest and charge for unlawful possession. The Chief Constable, giving evidence before a committee of the House of Commons, said that there were seventy closed mills in Blackburn, and these had suffered numerous thefts of metal parts and leather belting from the machinery that still remained in them. Lead-stripping from roofs was also prevalent. The owners of the mills were often difficult to trace, their premises being in the hands of agents; and the stolen articles were difficult to identify, since all the mills used similar plant. When persons were found by the police to be in possession of such articles in suspicious circumstances they generally refused to give any information except that they had found the articles on a rubbish heap. All the police could do was to prefer a charge of "stealing from some person unknown" and get the man remanded for further inquiry; and as no further evidence was usually then forthcoming he was discharged.[19]

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[17] Above, p. 599.

[18] (1910) 4 Cr.App.R. 64; 74 J.P. 200; 26 T.L.R. 265.

It is clear that this position is substantially altered by legislation creating an offence of unlawful possession, not because this legislation increases the power of the police to arrest and search but because it increases the chance of a conviction. Under this legislation, the burden of giving an explanation is cast upon the accused, and the practical effect of this is to deprive him of the submission of no case. This in turn is likely to mean that he is forced into the witness-box, and his unsatisfactory answers on cross-examination will enable him to be convicted.

It now becomes evident that the effect of the legislation is to alter the practical effect of the ordinary law of larceny, procedure and burden of proof by the device of creating a special offence. It enables the accused to be convicted of a special statutory offence before a magistrate when he could not be convicted of what is socially the same offence, *viz.*, larceny, before judge and jury. Put in this way, the legislation is clearly objectionable in form, whatever may be thought of its general purpose. If the ordinary law is defective it should be amended; but the amendment should be properly designed to rectify the defect. There is no valid argument for patching up the law by creating a special summary offence in some areas only.

Let us ask, then, whether the ordinary rule for larceny as set out above is open to criticism. It is submitted that the law of larceny is not inadequate to meet the legitimate demands expressed by the Chief Constable of Blackburn. Suppose it to be proved that the defendant was found in possession of machinery in circumstances that are suspicious, because it seems unlikely that he would have legitimately acquired such machinery for any legitimate purpose of his own. This is deposed to by the police constable who arrested. It should then be possible to put someone in the witness-box to say that similar machinery has within his own knowledge been stolen from a number of mills in the district. It is submitted that this evidence ought to be regarded as sufficient to establish a case to be answered. If the magistrates of Blackburn took a different view of the law, it is submitted that they were wrong.

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[19] See the account given by C. H. Rolph in (1945–46) 7 *Howard Journal* 55.

It is not a requirement of the law of larceny that the prosecution should establish the identity of the person from whom the theft has taken place. Suppose that two premises are raided at about the same time and similar goods stolen from each. The accused is found in possession of such goods, and clearly stole them from one or other of the premises, but it cannot be said from which. A conviction for larceny is proper, even though the premises are in different ownership: the goods may be laid as the property of a person unknown. The argument is just the same if, instead of two firms being the victims of theft, there are twenty. It is not necessary that any victim should be able to swear that the property found on the accused is his, if property of that kind has lately been stolen from somebody. Since the evidence is not essential to secure a conviction, obviously it is not essential to establish a case to be answered.

To this extent, then, the law of larceny is sufficiently effective to deal with the type of case under consideration. But the law of larceny is restricted in a way which it is submitted is right. A vague suspicion on the part of the police that a man has come into possession of goods unlawfully does not justify them in making a charge against him. To revert to the case of *Joiner*, if the defendant was guilty it is difficult to understand why no neighbouring breeder of pheasants could be called to say that he had lost some birds. In normal circumstances where a larceny has occurred, such evidence would be forthcoming. It is right to require the prosecution to secure it. There is no sufficient reason to modify the established law of larceny in this respect, or to create a special offence of unlawful possession in order to by-pass it.

Moreover, there are exceptional circumstances where the ordinary law of larceny allows a conviction although no loss of the goods can be shown. In the well-known pepper case, where a man was found leaving a pepper warehouse with his pockets full of pepper, it was held that a conviction for larceny was proper, although it was not possible to prove the loss of such a small quantity of pepper.[20]

Thus the law gives the presiding judge a considerable measure of freedom to decide, on common-sense grounds, that a prima facie case has been made out; and in the absence of a reasonable explanation it gives the jury a similar discretion to convict.

The unlawful detention statutes are to be deplored not only for their lax definition of the offence and sundry difficulties of interpretation, but for their indiscriminate transfer to the defendant of the burden of proof. Modern legal science distinguishes between the persuasive and evidential burden of proof. It is acceptable doctrine that evidence implicating the accused in reasonable suspicion will discharge the evidential burden resting on the prosecution, but quite unacceptable that such evidence should discharge the persuasive burden—the burden of proving guilt to the satisfaction of the jury or magistrates.

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[20] *Burton* (1845) Dears. 282; 169 E.R. 728; *cf. Hooper* (1858) 1 F. & F. 85; 175 E.R. 637; *Mockford* (1868) 11 Cox 16; 17 L.T. 582; 32 J.P. 133 (C.C.R.).

Laboratory Investigation in Firearms Cases

(IV)

THE EXAMINATION OF THE FIREARM AND AMMUNITION

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The general and mechanical condition of a firearm may be of the utmost significance and have a direct bearing on the outcome of an inquiry into a shooting incident.

There are, in this country, a relatively large number of accidents with firearms, particularly shot-guns, many of which can be attributed to accidental discharge due to faulty weapons. There are also many incidents when the reason advanced for the shooting is quite wrongly that of a faulty weapon. It is for this reason that careful attention needs to be paid to this aspect of the laboratory examination of a firearm.

Preliminary examination

A complete description of the firearm with particular regard to its general condition is noted. In addition to the general appearance of the firearm the state of the barrel interior is often a useful pointer to the manner in which the gun has been generally cared for. The barrel is examined for the presence of " fouling " due to the firing of the weapon. Any residues in the barrel are preserved for detailed examination should this be necessary.

Recent firing

The laboratory may be called upon to say whether or not a weapon has been recently fired. Very recent firing can sometimes be detected by the characteristic odour of burnt powder and when this is present it is, in fact, the most reliable confirmation of recent firing. However, the intensity and nature of this smell of burning powder varies considerably with different powders and in some cases quickly disappears. Chemical tests applied to the fouling residues are of little value in this respect in these days of smokeless powders.

It is not usually possible to determine within close limits whether a weapon showing the presence of fouling has been recently fired. However, it may be possible to establish that it has not been recently fired if the bore shows the presence of rust, cobwebs or long-standing dust accumulation. There are also times when it is obvious that a firearm could not possibly have been fired because of its poor condition.

The barrel interior of a firearm can be examined by means of a microscope specially designed for this purpose which can be clamped on to the muzzle end of a barrel. The microscope can be focused on any portion of the barrel it is desired to examine.

Mechanical condition

The mechanical condition of all firearms submitted to the laboratory is carefully considered, and all the possible methods of bringing about the discharge of the firearm are noted.

Many firearms, particularly hammerless shot-guns, self-loading pistols and rifles, are fitted with safety devices designed to prevent accidental pressure on the trigger bringing about the discharge of the weapon. Some of these safety devices are often designed to be automatically left in the "safe" position when the firearm is loaded. Others need to be operated manually. Frequently the safety device is found to be ineffective. Revolvers and hammer guns are seldom fitted with safety mechanisms, although many hammer shot-guns have a "half cock" position of the hammers which is intended to be safe. This does not always follow and such guns are often encountered when it is readily possible for the gun to be fired from the half cock position. On the other hand the hammer of a gun does not always fall with sufficient force from the half cock position to cause the detonation of a cartridge.

Trigger pressure

The degree of pressure required to be exerted on the trigger to discharge a firearm may be of value to the court in deciding whether the weapon might reasonably have been discharged unwittingly. A very light trigger pull is often considered dangerous since it may be found possible to discharge the firearm by means of a knock or blow delivered to some part of the weapon, particularly if the stock is jarred on a hard surface.

The trigger pressure is therefore always determined even though it may seem irrelevant. It is the practice of the writer to report the minimum pressure required, irrespective of the angle of application of the pressure.

The method employed for the determination of trigger pressure is by means of suspending dead-weights in a special holder from the trigger. This is regarded as a reasonably accurate method of determining normal trigger pulls. However, when the trigger pressure is very light and it is necessary to determine the pressure within very close limits, a special holder is used in conjunction with lead shot instead of weights. Lead shot can be added to the container as required and the whole apparatus is afterwards weighed. Special spring balance type trigger pull testers are available but are not generally regarded as being sufficiently accurate for court purposes.

A guide to approximate trigger pressures for various types of firearms is contained in the following table:

Shot-guns	3½ to 5 lb.
·22″ rifles	3 to 4 lb.
Service and large-bore rifles ...	4 to 7 lb.
Revolvers—single action	3 to 5 lb.
Revolvers—double action	8 to 20 lb.
Self-loading and automatic pistols ...	3 to 12 lb.

When trigger pressures heavier than these are encountered it does not necessarily follow that they are safer in use. Whilst most revolvers can be fired either by first cocking the hammer (referred to as single-action firing) or from the uncocked position (double-action), some military and hammerless revolvers can only be fired from the uncocked position. On the other hand most self-loading pistols require only a single pressure, but there are some such firearms in which, in addition, a double-action pressure is provided for.

Firing tests

All firearms examined in the laboratory are submitted to firing tests. In many cases this is essential and may involve tests using crime ammunition. It is generally desirable that all weapons should be fired from the hand, consistent with the rules of safety. This permits the laboratory investigator to " get the feel " of the weapon and thus be in a position to answer any questions which may arise concerning the behaviour of the firearm under firing conditions. There are times when it might be considered dangerous to follow this practice because of the weapon's poor construction or condition. This applies particularly to home made firearms.

A firearm in good condition should not be prone to discharge as a result of a knock or jolt on a hard surface. In addition to this, the possibility of discharge in any other abnormal way is investigated. It may be possible to discharge a weapon by means of a blow delivered to the back of the uncocked hammer—this possibility has been precluded in most modern firearms. Sometimes it is found that allowing the partially cocked hammer to fall on to the firing pin will detonate a cartridge. Such possibilities exist, particularly in old guns and guns in poor condition. Pressure exerted on the back of a cocked hammer will sometimes push it off cock and cause its discharge.

An example of a double-barrelled shot-gun in a particularly poor mechanical condition was examined by the writer in connection with a charge of attempted murder. The gun in question was used by a boy who was alleged to have discharged both barrels from close range at his step-father. The only damage arising from his action was that to the lapels of the complainant's jacket. The examination of the gun showed that it was very old and in a worn and dilapidated condition. Crude and ineffective attempts at repairing the broken stock with insulating tape were unsuccessful, for the stock was still very loose on the action. Because of this it was possible for both hammers to be released from the cocked position by means of the slightest downward deflection of the barrels, causing the discharge of both barrels simultaneously. Only if extreme care was used in loading and cocking the hammers was it possible to prevent its accidental discharge and to fire the gun in the normal manner by pressing the triggers. This operation was extremely delicate, and it is most doubtful whether the accused did in fact manage to take aim and squeeze the triggers.

Home made firearms sometimes present a problem to the laboratory investigator. It is surprising how crude and, sometimes, simple they can be, and yet capable of being fired. Fig. 1 shows a photograph of one of a pair of extremely simple but, nevertheless, effective firearms made by, and recovered from, two youths who were using suitably sized and selected pebbles as missiles. They consisted of half-inch diameter iron gas pipe which had been bent to the shape shown. A length of solid copper had been hammered firmly into the curved part forming the butt. A three-sixteenths inch hole had been drilled in the top of the pipe near the " breech " end, to form a " touch " hole. The main propellent powder charge consisted of black powder recovered from stolen safety fuse. This was rammed in from the muzzle end of the barrel. The pebble was then muzzle loaded. A small piece of safety fuse, approximately one inch in length, was then inserted into the " touch " hole as shown in the photograph. A match was used to ignite the safety fuse, which in turn would ignite the main powder charge. Tests carried out with the firearm demonstrated its lethal properties. It was capable of firing a pebble which would completely penetrate a half-inch thick block of pine, as shown in the photograph, at a range of six feet.

Fig. 2 shows two home-made firearms used in an attempted murder and attempted suicide. These are somewhat complicated compared with that shown in Fig. 1. They were made by a man who planned to shoot his wife and then to shoot himself. His reason for making two such weapons became obvious when they were examined. The firearm was built round the cartridge, which was a ·303″ military rifle cartridge. This proved to be an unfortunate choice on the part of the accused in view of the fact that the barrel consisted of a piece of half-inch copper tubing. The cartridge had been fixed in position with soft solder, and the barrel had been similarly reduced in bore in the region of the bullet. The firing pin consisted of a six-inch length of three-eighths inch diameter steel rod which could be held in the cocked position by means of a crude ratchet arrangement connected by means of a piece of wire to the trigger.

These efforts at making a firearm were not very successful because in both cases when the weapon was fired the barrel burst, consequently the bullet was discharged with a considerably reduced velocity. In the case of the first one, which was discharged in the direction of the accused's wife, the barrel burst in an upwards direction. When the accused fired the second in close contact with his head, the barrel burst underneath, resulting in injuries to his fingers. Although the bullet penetrated his head, the result was not fatal, because of the reduced velocity.

Fig. 3 shows two modified weapons used in the commission of crimes. One is a double-barrelled ·410″ shot-gun which has been shortened by sawing both the barrels and the stock, thus converting it into a " pistol." This is one of a number of similar conversions examined from time to time, and is probably typical of the type of conversion effected by the armed criminal as distinct from that usually associated with poachers. The latter conversion usually consists of a shortening of the barrel only.

The usual reason for shortening a barrel and possibly the stock, is to make the firearm more portable and more readily concealed on the person. In the case of shot-guns, this is sometimes done with the misconceived idea that the shortening of the barrel will result in a much greater spread of the shot. For all practical purposes the spread of shot is not affected, except when the shortening has removed the choked portion of a barrel.

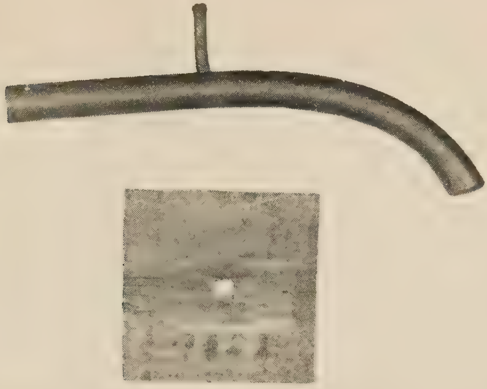
The other weapon in Fig. 3 is a ·45″ service revolver in which the barrel has been shortened by sawing. This weapon was an exhibit in connection with the attempted murder of a Detective

Sergeant. The revolver was alleged to have been fired three times in the course of a struggle between the sergeant and the accused, resulting in an area of scorching and blackening on the left lapel of the jacket of the officer. Upon examination the firearm was found to be in good mechanical condition, but the cartridges which had been fired were faulty and the three bullets had lodged in the barrel. An examination of the cartridge cases revealed that the propellent had become contaminated with oil and grease due to long storage of the loaded revolver in an excessively greasy and oiled condition. It is interesting to note that some ninety-one firearms and over 10,000 cartridges of all descriptions were found in the home of the accused.

To some extent, mechanically faulty firearms contribute to the seriousness of many shooting incidents. On the other hand, the use of faulty ammunition often results in less serious consequences for the victim, and, perhaps, for the user of the firearm.

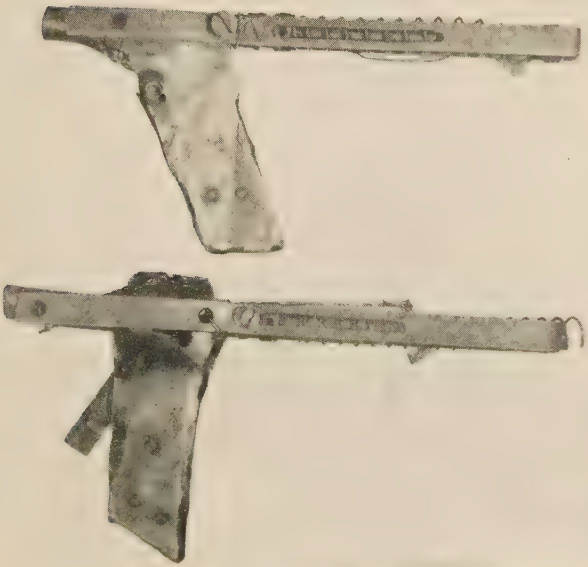
Sometimes a laboratory examination reveals a combination of faults in the firearm and the ammunition used, although it may be difficult to pin-point a fault in a crime cartridge unless similar faulty cartridges are traced to the possession of the accused. Exhibits examined by the writer in connection with a charge of attempted murder of a man by his wife were interesting in this respect. It was alleged that a ·38″ revolver was used by the accused, but her efforts were far from successful. Although the gun was discharged at comparatively close range, *i.e.*, within the confines of a living-room in their home, the bullet which penetrated the complainant's jacket and shirt only caused a superficial wound in the chest region. The revolver, the cartridge case and the bullet were examined. The revolver was found to be in good mechanical condition, but it was noted that the barrel had been extremely badly made. In addition to the defective rifling, the bore was slightly oversize for the particular cartridge used by the accused. There was excessive space between the cylinder and the barrel, which allowed a serious loss of pressure when the revolver was fired. Although test firing, using cartridges similar to the crime cartridge, showed a somewhat low velocity and penetration of the bullets, it was apparent that the lack of penetration of the crime bullet could have resulted also from a faulty cartridge.

Fig. 1



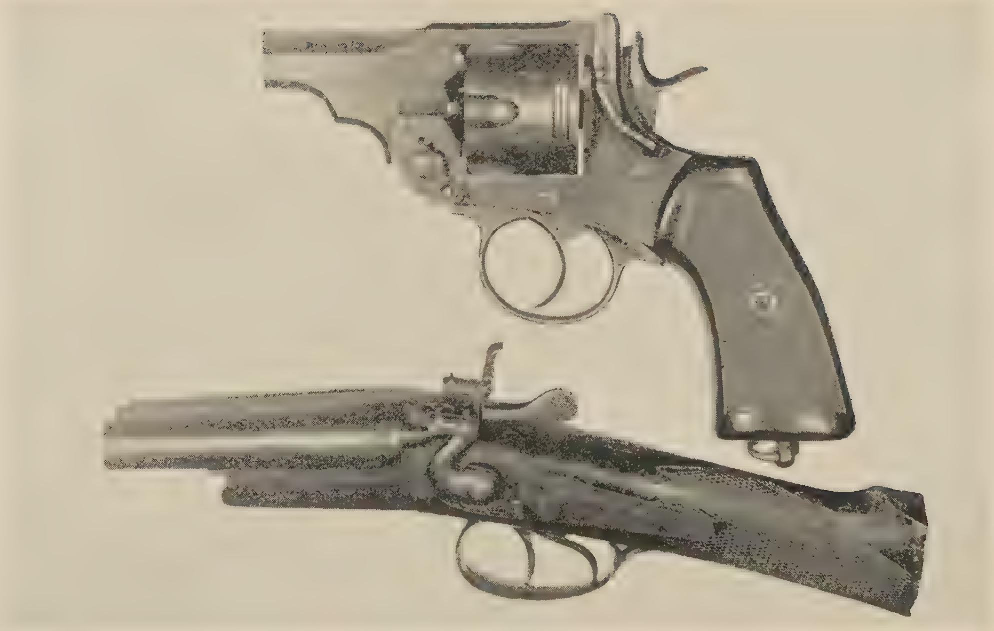
Home made muzzle-loading gun with piece of wood used for test firing showing exit side of bullet hole.

Fig. 2



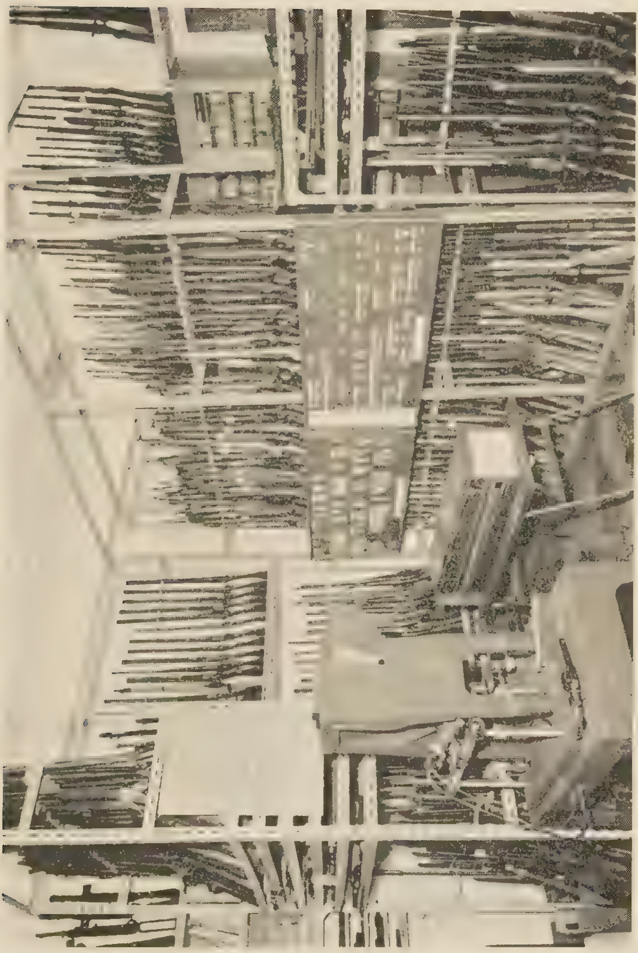
Pair of home made ·303″ pistols.

Fig. 3



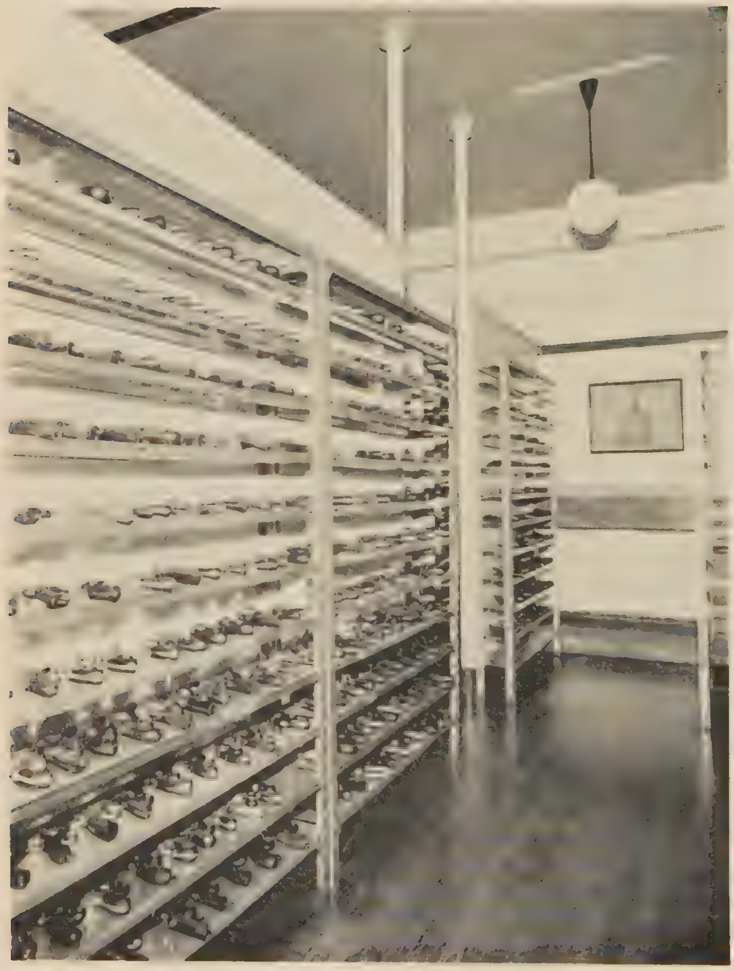
Webley Mk. VI revolver with sawn-off barrel.
·410″ double-barrelled shot gun with sawn-off barrels and stock.

Fig. 4



Ballistics laboratory showing part of the rifle collection. The comparator microscope is seen on the left and the bullet recovery box is shown in the centre of the photograph.

Fig. 5



Ballistics laboratory showing part of the revolver collection.

Mr. Sutterthwick's Court

By A. E. Jones,
Magistrates' Clerk

Publishing Obscene Articles

How to proceed

The wooden bench which ran along the front of the dock was just as uncomfortable as the one inside the iron bars, but it was a sign of class distinction in crime. It had originally been fought for and won by the pioneer motorists who blazed that trail to the police court which has since been followed by so many of their successors; and now it had become the privileged seat of all who appeared by summons to answer for their alleged misdeeds. The dock was reserved for those who had suffered the indignity of arrest—the " real criminals " in the view of the rest.

Laurence Graffiter had come before Mr. Sutterthwick, not on account of motoring peccadilloes, but to face three charges of publishing obscene articles—offences which each carried a possible sentence of three years' imprisonment at quarter sessions. However, because the prosecutor's solicitor had prudently applied for a summons and not a warrant, Sergeant Quing, the warrant officer, motioned the defendant to go in front of the dock and not inside it.

" Are you proceeding summarily, Mr. Tarkaway? " asked the clerk.

" It is certainly a case which I ask you to deal with sir, if the accused consents," said the prosecuting solicitor, addressing the magistrate.

" This offence is no longer in the Schedule of indictable offences which may be dealt with summarily by consent. The new Obscene Publications Act makes it both a summary and an indictable offence, and so the prosecution has a choice of procedures," explained Frell.

Mr. Tarkaway, whose library on magisterial law consisted of a far from recent edition of Stone's *Justices' Manual*, had had long practice in preserving an unruffled demeanour when an announcement of this kind took him by surprise. " As I said, I am asking the learned magistrate to deal with the case," he replied.

Frell proceeded to inform Laurence Graffiter of his right to be tried by a jury. As he paused for a reply, Mr. Tarkaway leaned across and murmured " Why are you taking his consent, Mr. Frell, if it isn't triable by consent any longer?"

" I'm not taking his consent. He has to be told he can claim jury trial because he's liable to more than three months' imprisonment on summary conviction," the clerk murmured back.

" Well, it comes to the same thing then, in the end. Why all the fuss? " commented Mr. Tarkaway genially, and sat back before Frell could begin to expound the important differences between the two procedures.

The defendant, who had been waiting respectfully for the experts to finish their mysterious whispering, took the opportunity to announce, without irony, that he wanted his case settled that day. In reply to a further question from the clerk he confirmed that he meant that he did not want to be tried by a jury.

Before a plea could be taken to the charges, Mr. Sutterthwick, who had been looking very thoughtfully at his register, said " Aren't cases like this usually brought by the Director of Public Prosecutions? "

" I believe that the police do report obscene publications to the Director, as a matter of practice, sir ; but there are no statutory restrictions on who may prosecute," said Frell. He had made it his business, before coming into court, to look through the Act for any procedural points.

" I did consider the possibility of referring the matter to the Director of Public Prosecutions, sir," said Mr. Tarkaway. " But I came to the conclusion that the circumstances of this case made it eminently one for a private prosecution."

" If I remember rightly, the letters you showed me when you applied for the summons were in disgustingly erotic terms and purported to be addressed by a woman to your client. I suppose that, as you are alleging that the defendant, in fact, wrote them, you are putting this forward as a kind of *R.* v. *Adams* [1] case," said Mr. Sutterthwick, who also had been doing a little legal research.

Mr. Tarkaway's expression gave only the most fleeting hint of his state of mind before he said, with learned solemnity, " There are a number of cases cited under the title '*R.* v. *Adams*,' sir. Which one in particular are you referring to, may I ask, with respect? " But Mr. Sutterthwick had had long experience of Mr. Tarkaway and could match finesse with finesse when he chose. " I mean *the* case of *R.* v. *Adams*, of course, Mr. Tarkaway—the one decided in 1888," he said.

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[1] (1888) 22 Q.B.D. 66.

" I must confess, sir, that that particular case is one which had escaped my notice in relation to this prosecution," said the solicitor, acknowledging defeat with dignity.

Satisfied with this surrender, Mr. Sutterthwick explained: " In *R.* v. *Adams*, a young man sent a respectable young woman a letter making immoral proposals. There was no publication except to her; but it was held to constitute the common law offence of publishing an obscene libel, because there was a likelihood of a breach of the peace resulting. I presume that, in this present case, you will submit that a breach of the peace is also likely when a man receives from another man letters such as these."

Mr. Tarkaway failed to conceal his surprise this time. After a moment's thought he said, " No, sir, I do not think I can frame my case on those lines, with respect. My client is a man of this century and of mature age—not a Victorian miss. I must not, in all fairness, pretend that he resented the phraseology of these letters. In fact, I regret to say that he went out of his way to invite just this kind of obscenity."

" Then what business has he to complain of it now? " said the magistrate sharply.

" I can explain that, sir—and, I am sure, satisfy you that there is ample justification for these proceedings. But before I tell you the facts, perhaps it would be well to ascertain the defendant's plea, sir? "

" No, Mr. Tarkaway, I'd like to hear your opening first. I want to make sure that there is something to which he should be called on to plead."

Case for the prosecution

" As you please, sir. . . . This case began nearly twelve months ago, when my client saw an advertisement in a not very reputable magazine asking for new members for what was called the Casanova Pen Mates Club. He answered the advertisement and received a reply from the defendant, who, throughout, has made no concealment of his name and address. According to what the defendant wrote, his Club consisted of a number of persons of both sexes who were interested in Casanova and his exploits, and desired to correspond with one another on those and kindred topics. Membership of this so-called Club was offered for an annual fee of two guineas; but it was emphasised in the literature sent by the defendant that this membership was a confidential matter, and no member would have his or her real identity or address disclosed to another. Accordingly, all correspondence had to pass through the defendant, he undertaking to post it on in properly addressed envelopes. Prospective members had to fill in a form detailing their tastes so far as the opposite sex was concerned; and my client sent this, together with two guineas, to the defendant. He received a reply stating that a young woman named 'Evelyn' appeared to have tastes which matched his, and he was invited to write to her. That started a correspondence which soon became obscene and culminated in the three letters signed 'Evelyn' which are the subject of the charges but which are only specimens of a large number of such charges which could have been brought. As you will see from the letters, sir, 'Evelyn' represented herself to be a striptease dancer in a night club; and, so far as my client was concerned she carried the spirit of her performances into her correspondence, because her letters promised him all manner of delights when they met, but he never, in fact, managed to achieve a meeting with her. Although arrangements to spend a week-end together were frequently made, at the last moment there always came a letter which made some excuse for postponing the great moment and, at the same time, painted an even more exciting picture of what was in store for my client. The letters were cunningly contrived in another way also, sir. Every now and then, 'Evelyn' would become autobiographical and give some details of her past life—which had apparently been an unhappy one. One of its legacies, according to her, was a child which she was keeping with a foster-mother; and, from time to time, her letters would contain particulars of specially large expenses she had had to incur in connection with the child's upbringing. There was never any open request for money, but it was emphasised frequently that she was in considerable financial difficulties. My client, not unnaturally—and, perhaps, not out of pure altruism—sent her money on a number of occasions after receiving these letters. The total amount involved was some £50. All this correspondence, as I have already explained, passed through this man Graffiter, and my client was never given 'Evelyn's' address—either by herself or by the defendant. When the prosecutor finally realised what he should have known long before—that the defendant and 'Evelyn' were one and the same person, he did what he should also have done long before—he took advice. And these proceedings are the result. . . ."

"How did he find out that there was no such woman as 'Evelyn'?" interrupted Mr. Sutterthwick.

"It was really a gross piece of carelessness on the defendant's part that finally made him certain, sir—though he had begun to have suspicions some time previously. He had quite early on asked for and received from 'Evelyn' a photograph of herself which depicted her in somewhat inadequate clothing but was not otherwise objectionable. In the course of the correspondence he pressed her repeatedly to send him what he termed a 'really hot' picture of herself, and eventually he received a highly indecent photograph—which, however, was of a totally different woman."

"That seems an extraordinary mistake to have made," commented the magistrate.

"I venture to suggest, sir, that it was caused by the extent of the defendant's 'business'—if it may be called that. It seems a reasonable inference that, through being so many fictitious women to so many male correspondents, he left himself with insufficient time for whatever filing and indexing system he employed, and consequently mixed up his characters."

"Isn't this really a case of obtaining money by false pretences?" said Mr. Sutterthwick.

"I did consider that as a possible charge, sir. But I felt that the subscription of two guineas was paid really to obtain a correspondent—which would only amount to a promise as to future conduct on the defendant's part. It would be impossible for me to prove that the defendant was not in a position to put people in touch with one another; and, even if it were held that the onus of proof rested on him in that particular matter as being one peculiarly within his knowledge, he might be able to adduce cases, for, all I know, where he had effected genuine introductions."

"What about the sums sent after the falsehoods concerning expenses in connection with the child?" persisted Mr. Sutterthwick. But Mr. Tarkaway's clients over the years had obliged him to become very familiar with the standard technicalities of the standard police court offences; he did not need to refer to his edition of *Stone* for those—though it would probably have turned out to be quite up to date on such well-established law. "The defendant was very careful not to ask for any money, sir," he pointed out. "He might almost have been acting on legal advice on that point. The sums sent by my client were presents volunteered by him; and it could be urged for the defence that the domestic details given in the letters were inserted merely to add verisimilitude to what was undoubtedly a very unvarnished narrative. Besides, sir, there is the general question of 'intent to defraud.' It might be said that what my client wanted was obscenity, that he got precisely that, and that he isn't entitled to allege he was defrauded just because it wasn't written by the person he thought it was."

"There are cases which show that a person can be defrauded if he is induced by mis-statements of fact to act in a way which is against his interests," remarked the magistrate. "However, it is not for me to direct the prosecution. I must deal with this case on the charges which have been brought. And I must say that I am not satisfied yet that they have been properly brought. If this is not an '*R.* v. *Adams*' case, how can publication be alleged when the letters were not seen by anyone but the willing recipient?"

"There is a definition of 'publishes' in the Obscene Publications Act, 1959," said Frell, and read out from it: "A person publishes an article who—(*a*) distributes, circulates, sells, lets on hire, gives, or lends it, or who offers it for sale or for letting on hire."

"Which of those words do you say applies to this case, Mr. Tarkaway?" asked the magistrate.

Mr. Tarkaway considered for a moment or two and then said: "I'm content to say that the defendant *gave* my client the letters, sir."

"I'd like to see the Act myself," said Mr. Sutterthwick, and proceeded to study the copy which the clerk handed up to him. Finally he said: "I see that the offence is committed whether done for gain or not. . . . You may take the defendant's plea, Mr. Frell."

Laurence Graffiter meekly admitted his guilt on all three counts, and a detective sergeant, who had been watching the proceedings from the body of the court, came forward to the witness box.

"The police have made certain inquiries in this case, sir; and this officer can tell you something of this young man's antecedents," said Mr. Tarkaway.

"The defendant is a married man, 26 years of age," announced the sergeant. "He is employed as a timekeeper and has been with his present firm for the past four years. He is living with his wife in furnished rooms, but has, for some time, been anxious to have a home of his own. According to what he has told me, he started this enterprise with the idea of getting enough money to pay the deposit required to buy a house on mortgage. As you will realise, your worship, his fingerprints have not been taken, but I have no reason to doubt his statement that he has no previous convictions."

"Have you any idea of the extent of this business?" the magistrate asked.

"No, your worship—not really. The defendant could show me no books or records of the so-called Club. He said that very few people had answered his advertisements; but, as your worship will appreciate, very few people in a case like this would be willing to come forward and complain to the police."

After acknowledging that the particulars given about him were correct, the defendant was asked by the clerk whether he had anything to say to the magistrate. It would have taxed the ingenuity of experienced counsel to find anything else to say which could reasonably be considered to mitigate the offences. Graffiter did not attempt the task. All he said, after the warrant officer had motioned him to his feet, was "I'm sorry about all this, sir; and I can assure you it won't happen again."

Verdict and sentence

Mr. Sutterthwick fixed his gaze on him and said: "The Obscene Publications Act defines an obscene article as one tending to deprave and corrupt any person into whose hands it may be expected to come. It obviously can't be a defence that that person was depraved already or perfectly willing to be depraved—as the prosecutor in this case evidently was; otherwise the law would be unworkable. But, in dealing with you, I take into account the fact that, so far as the evidence before me goes, you have not debauched the mind of any unsophisticated person. For that reason I will impose a monetary penalty and not imprisonment. But it will be a heavy one, because I must do my best to see that you don't make a profit out of this disgraceful traffic. You will pay a fine of £75 on each of the three summonses. I will give you four weeks to pay, but you must find the whole amount in that time. I gather that you have savings and this is meant to be a severe punishment. Because of the gravity of the offences I shall fix on each an alternative of three months' imprisonment in default of payment." The magistrate paused and said confidentially to Frell "Can I make the sentences consecutive?"

"Only up to six months, sir," was the reply.

"The alternatives will be consecutive in the first two cases," concluded Mr. Sutterthwick.

"Will you consider making an order for costs against the defendant, as well, sir?" said Mr. Tarkaway.

"No. The fines represent the total I think he should pay," said the magistrate.

"Would you then, sir, make an order for the expenses of the prosecution to be paid out of local funds?" persisted the solicitor.

"I'm sorry, but I must say 'no' again," said Mr. Sutterthwick. "The prosecutor can't expect the ratepayers to pay for his amusements—which is what that would come to. You must agree that he doesn't come very well out of this, Mr. Tarkaway."

" As you please, sir," said the prosecuting solicitor diplomatically.

Frell could not resist adding, " there would be no power to order costs out of local funds in this case because the court did not begin to hear it as an indictable one."

Case and Comment *

AVIATION

Carriage by air—Air Corporations Act, 1949, s. 24 (*3*) (*c*)*—bona fide members of I.E.L.A. not members of the public within section 24* (*2*).

D. P. P. v. Milbanke Tours, Ltd.

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Donovan and Davies JJ.: [1960] 1 W.L.R. 630.[1]

Defendants, who were travel agents, were agents for the International English Language Association, whose objects were the advancement of a greater knowledge of the English language. Any member of the public willing to declare his support for the objects and aims of the I.E.L.A. was eligible for membership on payment of an annual subscription of one guinea. I.E.L.A. chartered aircraft from a private air company to take their own members on foreign tours, which they were legally entitled to do.

The defendants advertised and took bookings for their own tours. The defendants required permission from the Minister under section 24 (3) (*c*) of the Air Corporations Act, 1949, to transport their clients by aeroplane. Their applications for permission were refused; but they did not so inform their clients. Shortly before the clients were due to commence their journeys, they were informed that they could not travel as arranged, but that if they would join I.E.L.A. they could go on the association's tours which were on the same dates and to the same places as the tours for which they had originally booked. The defendants' clients joined I.E.L.A. and departed on their journeys as arranged.

Informations were preferred against the defendants, charging that they, not being one of the corporations or associates under the Act of 1949, carried passengers for reward on a scheduled journey, contrary to section 24 of the Act.

The magistrates were of the opinion that all the persons who travelled on the occasions referred to in the informations were bona fide members of I.E.L.A., and dismissed the informations. On appeal by the prosecutor,

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* Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For the prosecutor: *Mervyn Griffith-Jones* (instructed by the Director of Public Prosecutions). For the defendants: *F. H. Lawton, Q.C.* and *Charles Lawson* (instructed by Forsyte, Kerman & Phillips).

Held, that as all passengers were found to be bona fide members of I.E.L.A., they were not members of the public within the meaning of section 24 (2) of the Act, and therefore that no offences had been proved.

Commentary. Section 24 provides, in effect, that the air corporations and their associates shall have a monopoly. It is an offence for any other person to operate a systematic service in such a manner that the benefits of it are available to members of the public seeking to take advantage of it. The prosecution argued that the passengers were members of the public because anyone can join I.E.L.A. and these persons joined simply in order to be able to travel in the aircraft. The view of the court was that these services were not available to members of the public as such, but only to such members of the public as joined I.E.L.A. Ease of membership and motive in joining are irrelevant considerations. I.E.L.A. is a bona fide organisation and there was clearly evidence on which the magistrates could find that the passengers were in fact bona fide members of it.

The position would apparently be different if the organisation was "a sham." This, presumably, would be the case if its only or principal object was the evasion of the section. I.E.L.A.'s genuine object is the advancement of a greater knowledge of the English language.

EVIDENCE

Burden of proof—direction to jury

R. v. Rice

Court of Criminal Appeal: Hilbery, Cassels and Donovan JJ.: June 27, 1960.[2]

R. was convicted at quarter sessions of larceny. In summing-up the Chairman directed the jury: "If you are satisfied that [the prisoners] were present in the motor-car park . . . on a common enterprise . . . they would be . . . guilty . . ."; and later: "Now members of the jury, you have been told before, and it is very important, that in all these cases the burden rests upon the Crown to satisfy you and to satisfy each one of the twelve of you, that a charge is made out before you find a verdict of guilty. I usually tell a jury that if you are so satisfied, then it is your plain duty to convict; if you are not so satisfied, of course, not only is it your duty to find the accused not guilty but you would be only too glad to do so. And that, of course, you should also do if you feel, after carefully considering the whole of the evidence, that there is any reasonable doubt whether the charge is made out or not." On appeal to the Court of Criminal Appeal R. contended that there was no sufficient direction upon the burden of proof:

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[2] For the appellant: *B. Wigoder* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *D. Hollis* (instructed by the Solicitor, Metropolitan Police).

Held, dismissing the appeal, that as this court had said more than once, there was no particular or strict formula to be followed in directing the jury as to the burden of proof. It was sufficient if there was a plain direction that the jury must acquit unless they were satisfied of the accused's guilt beyond a reasonable doubt. Here the Chairman was saying in plain terms: If you feel after carefully considering the whole of the evidence that there is any reasonable doubt whether the charge is made out or not, you must find him not guilty, and that was a sufficient direction in law. This was an appeal on a point of law so that leave to appeal had not been sought or given; but no member of this court would have granted such leave and, accordingly an order would not be made that the time spent awaiting appeal should count towards the sentence. The appeal would be dismissed and the appellant would lose the usual period of six weeks out of the time awaiting appeal. [H. P.]

Commentary. In *R.* v. *Hepworth and Fearnley* [1955] 2 Q.B. 600 the Court of Criminal Appeal, *per* Lord Goddard C.J., laid it down that a judge would be "on safe ground" in a criminal case if he said to the jury "'you must be satisfied beyond reasonable doubt,' and one could also say, 'you, the jury, must be completely satisfied,' or better still, 'you must feel sure of the prisoner's guilt'." This case modified the ruling by Lord Goddard in *R.* v. *Summers* (1952) 36 Cr.App.R. 14 that "it would be very much better" if summings-up did not use the expression "beyond reasonable doubt." The use of that traditional phrase would now appear to be fully restored to favour.

See Glanville Williams, "The Direction to the Jury on the Burden of Proof" [1955] Crim.L.R. 464 and *The Proof of Guilt* (2nd ed., 1958), 159; Cowen and Carter, *Essays on the Law of Evidence*, 242; and Maurice Lush, "'Satisfied Beyond Reasonable Doubt'—Canadian and Australian Cases" [1957] Crim.L.R. 170.

Receiving—insufficient evidence of "possession"—fingerprints

R. v. Court

Court of Criminal Appeal: Hilbery, Cassels and Donovan JJ.: June 27, 1960: *The Times*, June 28, 1960.[3]

C. was convicted at quarter sessions of receiving a stolen motor-car. The facts were that the stolen car had been found abandoned with false number plates and a false road fund licence. A number of fingerprints were found on the steering-wheel and on the driver's windows. On the back of the driving mirror was one of C.'s fingerprints, but none of the other fingerprints were his. When questioned by the police, C. denied that he had ever been in the car and gave a false Christian name. The prosecution contended that the fingerprint, being the impression of the left forefinger, indicated that it was C. who was driving the car; alternatively that, if C. was not driving, he was assisting the driver and was accordingly in joint control of the car. On appeal to the Court of Criminal Appeal:

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[3] For the appellant: *John Trench* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *D. Hollis* (instructed by the Solicitor, Metropolitan Police).

Held, allowing the appeal, that the case ought to have been withdrawn from the jury on the ground that there was no sufficient evidence of possession. The mere fact that C.'s left forefinger print was on the back of the driving mirror could not be stretched into evidence of possession of the car. Evidence of possession based on the single fingerprint was altogether too rarefied to be accepted. Furthermore, it was not a correct proposition of law to say that anyone who assisted in the control of the car was in possession of it. There were, of course, cases where assistance in control could amount to possession, but one would need to know more about the circumstances before such a conclusion could properly be drawn. A person would not be in possession of a car merely because he wiped the inside of the windscreen for the driver or switched on the windscreen wipers. The facts of this case were indeed highly suspicious. Not only did C. tell lies initially to the police but he did not go into the witness box to tell his own story. However, suspicion did not supply a gap in the evidence, and the gap here was evidence of possession. Accordingly the conviction would be quashed. [H. P.]

Commentary. In *Hobson* v. *Impett* (1957) 41 Cr.App.R. 138; [1957] Crim.L.R. 476, the Court of Criminal Appeal stated that "It is not the law that, if a man knows goods are stolen and puts his hands on them, that in itself makes him guilty of receiving, because it does not follow that he is taking them into his control. The control may still be in the thief or the man whom he is assisting, and the alleged receiver may be only packing the goods up without taking them into his possession, the goods all the time remaining in the possession of the person whom he is helping." The precise nature of the "control" or "possession" which the receiver must be proved to have is not clear. In the above passage the court seems to regard "control" as an element in "possession." In *R.* v. *Gleed* (1916) 12 Cr.App.R. 32 it was said that "it is sufficient if the alleged receiver has had control over the stolen goods." It may be, therefore, that possession in the strict sense need not be proved and that, *e.g.*, a servant's custody, amounting to control but not possession, would suffice.

It was not necessary to enter into these rather subtle distinctions (which seem to be unavoidable whenever the concept of possession is in issue) in the present case, since the only evidence was just as consistent with the absence of control or possession as with their presence and was not, therefore, sufficient to satisfy a jury beyond reasonable doubt.

Scots law—Conduct of tracker dog accepted as evidence

PATTERSON *v.* NIXON, see *post*, p. 634.

FOOD AND DRUGS

Unauthorised possession of a drug—Dangerous Drugs Regulations, 1953, reg. 3—insufficient evidence of " conscious possession "

R. v. Carpenter

Court of Criminal Appeal: Hilbery, Cassels and Donovan JJ.: June 27, 1960.[4]

C. was convicted at quarter sessions of the unauthorised possession of a drug (Indian hemp) contrary to Regulation 3 of the Dangerous Drugs Regulations, 1953. It was conceded at the trial that C. could not be convicted unless he knowingly had the drug in his possession. The facts were that C. was arrested in a house frequented by West Indians. No drug was found upon him but a small quantity was found in the locked boot of a car parked outside the house. C.'s case was that he did not know the drug was there; that he had gone to the house to gamble; and that the car had been borrowed from a friend some twenty-four hours previously. On appeal to the Court of Criminal Appeal:

Held, allowing the appeal, that this was a case where the trial judge ought to have ruled at the close of the prosecution case that there was no sufficient evidence of " conscious possession " of the drug to go to the jury. C. had possession of the drug in a strictly legal sense, and a question which might some day arise was whether *mens rea* was an essential ingredient of this offence. The question did not, however, arise in this case because it had been conceded at the trial that in order for a conviction to be obtained against C. it was necessary to show that he knowingly had this drug in his possession. There was here insufficient evidence of positive possession; C.'s demeanour at the time was consistent with innocence; the drug was in somebody else's car which C. had borrowed only twenty-four hours before; there was no evidence that C. was a man addicted to smoking this drug or that he had ever been to this house before. Further, C. was a man of extremely good character both as a worker and as a citizen. The evidence was insufficient to justify a conviction and, accordingly, the conviction would be quashed. [H. P.]

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[4] For the appellant: *F. A. Allen* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *W. P. Grieve* (instructed by Mr. D. E. Morgan, Birmingham).

Commentary. A person commits an offence (punishable on indictment by a fine of £1,000 or ten years' imprisonment) against the Dangerous Drugs Act, 1951, if he is in possession of more than one pound avoirdupois of one of the drugs specified in regulation 8 of the Dangerous Drugs Regulations, 1953, without a licence.

C. was, no doubt, in possession of the car which he had borrowed as a bailee. Authority is not lacking to show that he was, therefore, also in possession of anything that was in the car even though it was put there without his knowledge: *R.* v. *Reed* (1854) 6 Cox 284; *Williams* v. *Phillips* (1957) 41 Cr.App.R. 5. Another line of cases could be produced to show that a man does not possess until he knows what he has got: *Cartwright* v. *Green* (1802) 8 Ves. 405; *Merry* v. *Green* (1841) 7 M. & W. 623; *Russell* v. *Smith* (1957) 41 Cr.App.R. 198. The court seems to have followed the former line of cases, holding that C. " had possession in a strictly legal sense " (though the remark that there was " insufficient evidence of positive possession " is contradictory and difficult to understand).

If C. was in possession, then the *actus reus* was proved; and he was therefore acquitted because he had no *mens rea* as there was no evidence that he knew he was in possession of the drug in question. The court's observation that whether *mens rea* was an essential ingredient of the offence was " a question which might some day arise " seems to indicate that, while they were deciding this case on the basis of the law as it was assumed to be in the court below, they were not committing themselves as to whether the assumption there made, that *mens rea* was required, was correct or not.

The absence of the word " knowingly " from Regulation 3 points to the construction of the offence as one of strict liability, but is by no means conclusive; for " All that the word ' knowingly ' does is to say expressly what is normally implied . . . ," *per* Devlin J. in *Roper* v. *Taylor's Garages, Ltd.* [1951] 2 T.L.R. 284, 288.

SCOTS LAW

Evidence—conduct of tracker dog accepted as evidence

Patterson v. Nixon

High Court of Justiciary: Lord Justice-Clerk (Thomson), Lords Patrick and Mackintosh: 1960 S.L.T. (Court of Session Reports) 220.[5]

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[5] For the appellant: *Coutts* (instructed by Boyd, Jameson & Young, W.S., for L. McKinnon & Son, Aberdeen). For the Crown: *W. I. Stewart* (instructed by Lionel I. Gordon, Crown Agent).

The appellant was charged with breaking into a house with intent to steal therefrom. At his trial evidence of the conduct of a tracker dog was given by its handler and by police officers. The police also gave evidence of statements made to them by the appellant. Neither the appellant, nor anyone on his behalf, gave evidence. The court accepted the evidence of the dog handler and the police officers about the conduct of the tracker dog as reliable and sufficient in itself to warrant a conviction.

Held, refusing an appeal against conviction, (1) that where evidence was led about the conduct of a tracker dog, its value and significance depended on the circumstances in each case; and (2) that the evidence of the conduct of the tracker dog together with the evidence of the statements made by the accused was sufficient to justify the conviction. [D. C.]

Commentary. Evidence was given by the police as to the skill and reliability of the dog. The dog picked up a scent from various objects which had been touched by the intruder and, on being taken to the tenement in which the accused lived (the police having reason to think that he was the guilty person), led the police to the room in which he was. Subsequently, in tests made in the absence of the prisoner, the dog was able to pick out the accused's shoes from five other pairs, by following the scent from the objects in the house touched by the intruder.

No evidence was offered to the effect that people have different scents and that dogs are able to discriminate between one person's scent and another, but the court took judicial notice of this fact.

There appears to be no reason why such evidence should not be similarly admissible in an English court.

Trial—corroboration—jury misdirected

Martin v. H.M. Advocate

High Court of Justiciary: Lord Justice-Clerk (Thomson), Lords Patrick and Strachan: 1960 S.L.T. (Court of Session Reports) 213.[6]

Three men were charged together, on the same indictment, with theft. Only the first accused gave evidence. In the course of his charge to the jury, the sheriff-substitute said, "He is an associate according to the Crown in the commission of the crime and, as such, not only is he alleged to be dishonest, but the motives which may affect his evidence might be that he should in some way exculpate himself and inculpate his co-accused, so you must regard his evidence with the greatest care and accept it only where it is corroborated." The first accused was found guilty as libelled. Thereafter he appealed against his conviction on the ground of misdirection.

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[6] For the appellant: *Stewart* (instructed by Allan McDougall & Co., S.S.C., for Dunlop, Daly & Co., Glasgow). For the Crown: Lord Advocate (Milligan Q.C.), *W. I. Stewart, A.-D.* (instructed by Lionel I. Gordon, Crown Agent).

Held, quashing the conviction, *per* the Lord Justice-Clerk: "There was no ground for suggesting that his evidence was to be received *cum nota* or that so far as his possible credibility was concerned, he stood in any different position to any other witness, or that he had forfeited the ordinary rights accorded to an accused person who elects to give evidence on his own behalf."

Commentary. The defect in the direction was that it might lead the jury to think that they could not accept the accused's evidence in his own defence unless it was corroborated. This was quite contrary to the law of Scotland as, of course, it would be to the law of England.

When the evidence of an accused on his own behalf is incriminatory of a co-accused, it is the English practice to warn the jury of the danger of convicting the co-accused on that uncorroborated evidence: *R.* v. *Prater* [1960] Crim.L.R. 189 and commentary thereon.

There may thus be two aspects of a co-accused's evidence: (i) as going to his own innocence; (ii) as going to the other accused's guilt. It is clearly very important that the two aspects should not be confused.

TRIAL

Fair trial—adjournment refused—prisoner unrepresented

R. v. Carter

Court of Criminal Appeal: Lord Parker C.J., Hilbery and Havers JJ.: May 30, 1960.[7]

C. was convicted at quarter sessions of two offences of receiving, namely, receiving a stolen motor-car and stolen goods found in the boot of the car. According to the police C., when questioned, said: "O.K., I know it is a ringer. You have caught me" and: "Just a bit of bent gear. I did not nick it." C.'s case at the trial was that he had bought the car in good faith from a man named M. and had obtained a receipt. He denied he had made the alleged statements to the police. At the trial C. was unrepresented and, when asked whether he wished to cross-examine the first witness, asked for an adjournment so that he could instruct counsel. He said that he had been told only at ten minutes past eight that morning that the case was to be heard, and had understood that it was merely for the purpose of renewing his bail. He said that he was not in a position to prove his case. The application for an adjournment was refused. C. was later cross-examined about the receipt which he said he had obtained for the car, and he replied that he had not come to the court prepared to stand trial and had not brought the receipt with him. He also said in cross-examination: "I was called here today by the police saying I was required to renew my bail. My brother-in-law is in the court and he will verify that." After giving his evidence he was not asked whether he wanted to call his brother-in-law or any other witnesses. The deputy-chairman subsequently commented in summing-up on C.'s failure to produce documentary evidence in support of his case. On appeal to the Court of Criminal Appeal:

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[7] For the appellant: *J. Burge* (instructed by Edward Thompson & Co.). For the Crown: *Felix Waley* (instructed by the Solicitor, Metropolitan Police).

Held, allowing the appeal, that the case against C. was near overwhelming. Quite apart from the alleged admissions to the police the motor-car was said to have been bought under very curious circumstances. In all the circumstances, upon a proper direction it would have been very surprising if C. had not been convicted. The fact that the deputy-chairman had refused an adjournment would be no ground for interfering with the conviction. No doubt the deputy-chairman had had regard to the previous occasions when the case had been listed and to the fact that C. had been represented by solicitor and counsel at the magistrates' court, and felt that this was not a bona fide application. That was a matter of discretion with which this court would not interfere. But the matter did not end there. The deputy-chairman had said in summing-up: "Of course, there is no documentary evidence in support of this [the defendant's] story, and of course, if you accept his story, it depends on his own answer for what he did." That passage was most unfortunate in the circumstances. C. had throughout complained that he had the receipt but that he had not been able to bring it. Further, after giving his evidence, he had been sent back to his place and never asked whether he wanted to call his brother-in-law or whether he had any witnesses to call at all. Once the adjournment had been refused it had become imperative to ensure that this prisoner, who was unrepresented, had every opportunity of putting forward his defence and calling witnesses; and the court should have given him every assistance. In the result C. did not have a fair trial and, in those circumstances, no question of applying the proviso to section 4 (1) of the Criminal Appeal Act, 1907, could arise. Accordingly, the conviction must be quashed. [H. P.]

Commentary. Quarter sessions (like every other court) has an inherent power of adjournment as an incident to its jurisdiction: *Keen* v. *R.* (1847) 10 Q.B. 928; *R.* v. *McLain and Barr* (1922) 16 Cr.App.R. 109.

The judge's duty to see that the prisoner gets a fair trial requires him to look after the interests of undefended prisoners. At common law persons accused of treason or felony were not allowed counsel, but Coke wrote: ". . . the court ought to be instead of counsel for the prisoner, to see that nothing be urged against him contrary to law and right," 3rd Inst. 29.

Jury—communications between deputy-chairman and jury after retirement—new evidence given

R. v. Davis

Court of Criminal Appeal: Hilbery, McNair and Havers JJ.: June 14, 1960: *The Times*, June 15, 1960.[8]

D. was convicted at quarter sessions of obtaining money by false pretences. The nature of the false pretences was obtaining loans on the security of rings falsely represented to be of considerable value, whereas they were in fact worth very little. The evidence at the trial was that all the money thus obtained had been repaid in full together with some small amounts for interest. The false pretences were alleged to have been made in July 1957, and the evidence was that D. had commenced repayments in the same month or in August, in any event prior to the commencement of the police investigation in September. The question whether the repayments commenced before D. was interviewed by the police was emphasised in the summing-up as an important matter for the jury's consideration. After the jury had retired a question was conveyed from the jury to the deputy-chairman. The jury asked if they could see the counterfoils of postal orders relating to the repayments. The clerk of the court, accompanied by a shorthand-writer, went to the jury room and answered the question as follows: "Ladies and gentlemen, I am instructed to say that the postal order counterfoils have not been put in. You have all the exhibits in front of you now and therefore they cannot be put in front of you. The learned deputy-chairman says that you can take it for granted that it has not been disputed that all payments have been made." The foreman of the jury then said: "May I ask if at any stage we were given the actual date at which that money was received? That is the point." The clerk of the court said that he would have to make further inquiries and, after a further consultation with the deputy-chairman, returned and said: "I have made further inquiries. The learned deputy-chairman has instructed me to say that the documents . . . are not dated, so they would not help you. But so far as the evidence which you heard is concerned, the first payments were made in August or September 1957, and the last payments were made during 1958. There is no actual record of detail." On appeal to the Court of Criminal Appeal:

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[8] For the appellant: *Basil Wigoder* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Michael Parker* (instructed by the County Prosecuting Solicitor, Maidstone).

Held, allowing the appeal, that the communications between the deputy-chairman, acting through the agency of the clerk of the court, and the jury were wholly irregular. The question was not whether anything was done which was prejudicial to the accused. The vice of the matter was that the communications were private and not in open court. It had been laid down in *R.* v. *Willmont* (1914) 10 Cr.App.R. 173, and again in *R.* v. *Green* (1949) 34 Cr.App.R. 33, that any communications between the jury and the judge ought to be read out in court so that both the prosecution and the defence might know what was asked, and what was the answer. It was at the very basis of the whole of the administration of justice in this country that everything done in the course of justice should be done *coram populo* in open court. The fact that communications passed between the court and the jury in the present case otherwise than in public would of itself be enough to make it necessary to quash the conviction; but, in addition, what was said by the clerk of the court as to the documents being undated amounted to the introduction of fresh evidence, and fresh evidence could not be introduced once the jury had been enclosed. Further, what the clerk of the court had said as to the dates when payments had been made was inaccurate in that payments had in fact commenced in July 1957, and there were three receipts put in evidence dated August 1957. This case was a good illustration of just the dangers which were likely to arise from communications between the court and the jury otherwise than in open court. There was one final matter, namely, that the shorthand-writer for some inexplicable reason (and the court could think of no reason which would be a good one) was in the jury room. Once the jury had been enclosed it was improper for anyone to enter the jury room without the leave of the court, and there was nothing here to show that the shorthand-writer had been ordered to do so. This matter again was highly irregular. The conviction would be quashed. [H. P.]

Scots law—corroboration—jury misdirected

MARTIN *v.* H.M. ADVOCATE, see *ante*, p. 635.

Principles of Punishment

Sentences in the Court of Criminal Appeal

Prepared by HENRY PALMER, *Barrister-at-Law*

Arson

In R. *v*. ASTLE the court (Hilbery, McNair and Davies JJ.: June 14, 1960) varied a sentence of eighteen months' imprisonment, consecutive to a term of corrective training, to one of three years' imprisonment. A. had pleaded guilty at assizes to offences of arson. The offences were committed when A., who was then serving a term of corrective training, conspired with other prisoners to set fire to a workshop in the prison. A. was sentenced to a total of eighteen months' imprisonment, consecutive to the sentence of corrective training which he was then serving. The court stated that, as was clearly laid down in *R*. v. *Hedgecock* (1957) 41 Cr.App. R. 136, a sentence of imprisonment ought not to be passed so as to commence upon the expiration of a sentence of corrective training then being served. Accordingly, a sentence of three years' imprisonment would be substituted for the sentence of eighteen months' imprisonment, the sentence to date from conviction; and that would, of course, abrogate the remainder of the sentence of corrective training. This was not a case where a further sentence of corrective training would be appropriate because the Prison Commissioners had stated that A. was not suitable for further training.

Larceny

In R. *v*. GALL the court (Hilbery, McNair and Davies JJ.: June 14, 1960) affirmed a sentence of Borstal training. G., who was a young woman of nineteen years of age, had pleaded guilty at a magistrates' court to stealing from her lodgings and, after committal for sentence to quarter sessions, had been placed on probation. On failing to report a change of address, she was dealt with for the original offence by a sentence of Borstal training. G.'s previous history was that she had been committed to the care of a local authority in 1955. After absconding frequently, she was dealt with in 1956 as being beyond control and sent to an approved school, whence she again absconded many times. There were no other convictions. On appeal against the sentence of Borstal training the court stated that the sentence, looked at by itself, seemed to be severe for the offence to which G. had pleaded guilty, but her whole record showed that such a sentence was the one hope of redeeming her and training her into being a useful citizen. Accordingly, the sentence of Borstal training was affirmed.

Shopbreaking

In R. *v*. BEAL the court (Lord Parker C.J., Cassels and Davies JJ.: July 11, 1960) varied a sentence of three years' corrective training, consecutive to a sentence of imprisonment then being served, to one of three years' corrective training to commence at the date when the sentence of imprisonment commenced. B. had pleaded guilty at quarter sessions to three offences of breaking, and twelve other offences were taken into consideration. B., who was a man of twenty-eight years of age, had seven previous convictions. His last conviction was in January 1960 when he was fined for taking and driving away a motor-vehicle. He failed to pay the fine and was committed to prison on March 21, 1960, to serve a sentence of two months' imprisonment imposed in default of payment of the fine. The court stated that when a man serving a term of imprisonment was to be sentenced to corrective training, and certainly where the period of imprisonment was, as in this case, three months, the better course was to back-date the sentence of corrective training to the date when he first began to serve his sentence of imprisonment. Accordingly, the sentence of corrective training would be varied so as to date from March 21, 1960.

Unlawful sexual intercourse

In R. *v*. PAYNE the court (Lord Parker C.J., Cassels and Donovan JJ.: July 4, 1960) approved a sentence of two years' corrective training. P. had pleaded guilty at assizes to unlawful sexual intercourse with a girl between the ages of thirteen and sixteen years. P., who was a man of twenty-two years of age, had nine previous convictions (all of a different character to the present offence). The girl with whom the offence was committed was fifteen years of age and there was evidence that she looked older. She had at first told P. that she was sixteen years of age but, after the first act of intercourse, she had told him her true age, notwithstanding which he had continued to have intercourse with her on several occasions. The court stated that it was true that in many cases of this sort the offender would be conditionally discharged, but in most, if not all, cases the offender had a clean record. Here P. had nine previous convictions and the Prison Commissioners had reported that P. was in need of a prolonged period of supervision and training. A sentence of corrective training was unusual for this sort of offence but, in the circumstances, was fully justified.

Acts and Orders[*]

Animals

ABANDONMENT OF ANIMALS ACT, 1960 (8 & 9 Eliz. 2, c. 43). Operative July 1, 1960. This Act makes it an offence of cruelty, within the meaning of the Protection of Animals Acts (as set out below), for any person being the owner or having charge or control of any animal without reasonable cause or excuse to abandon it, whether permanently or not, in circumstances likely to cause that animal any unnecessary suffering, or to cause or procure or, being the owner, permit that animal to be so abandoned. The Protection of Animals Acts refer to: (a) in relation to England and Wales, the Protection of Animals Act, 1911, as amended by or under any other enactment, and the Protection of Animals Acts, 1911 to 1954, and (b) in relation to Scotland, the Protection of Animals (Scotland) Act, 1912, as so amended, and the Protection of Animals (Scotland) Acts, 1912 to 1954. " Animal " has the same meaning as in those Acts. The Act does not extend to Northern Ireland.

For penalties for contraventions see section 1 (1) of the principal Acts referred to above.

Atomic Energy

RADIOACTIVE SUBSTANCES ACT, 1960 (8 & 9 Eliz. 2, c. 34). Operative on a day to be appointed. This Act regulates the keeping and use of radioactive material, and makes provision as to the disposal and accumulation of radioactive waste and matters connected therewith. These provisions will come into effect on a day to be appointed by Order in Council. As from the appointed day no person shall, on any premises which are used for the purposes of any trade, business or profession or the undertaking of a public or local authority, keep or use or cause or permit to be kept or used radioactive materials of any description unless either he is registered for that purpose in respect of those premises or is exempted from registration under the Act or the radioactive material in question consists of mobile radioactive apparatus in respect of which a person is registered or exempt from registration (section 1 (1)). Registration is made with the Minister of Housing and Local Government, and the Minister may allow or refuse application for registration as provided for by section 1. The United Kingdom Atomic Energy Authority are exempted from registration (section 2). Special provision is made regarding mobile radioactive apparatus (sections 3 and 4). Registrations under section 1 or 3 may be varied or cancelled by the Minister (section 5). Sections 6 and 7 provide that as from the appointed day no persons shall dispose of any radioactive waste on or from any premises used for the purpose of an undertaking carried on by him or accumulate radioactive waste on such premises except in accordance with an authorisation granted to him by the Minister under section 8. Section 9 deals with the function of local and public authorities. Section 12 gives the Minister power to appoint inspectors for the purpose of the Act, and confers certain rights of entry and inspection on them.

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[*] Prepared by F. MAURICE DRAKE, *Barrister-at-Law*.

Offences under the Act are dealt with in section 13, which provides that it is an offence to contravene certain provisions of the Act therein specified, and that the penalties for contravention shall be (a) on summary conviction a fine not exceeding £100 or three months' imprisonment, or both, and (b) on conviction on indictment a fine, or imprisonment for a term not exceeding five years, or both (section 13 (2)). It is further made an offence to disclose details of certain processes or trade secrets given or obtained under the Act. The Act applies to Scotland and Northern Ireland. Proceedings in respect of any offence under the Act may not be instituted in England or Wales without the consent of the Director of Public Prosecutions.

Children and Young Persons

INDECENCY WITH CHILDREN ACT, 1960 (8 & 9 Eliz. 2, c. 33). Operative July 2, 1960. Further provision is made for the punishment of indecent conduct towards young children, and the maximum sentence of imprisonment under the Sexual Offences Act, 1956, for certain existing offences against young girls, is increased.

Any person who commits an act of gross indecency with or towards a child under fourteen, or who incites a child under that age to such an act with him or another, is liable on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction to imprisonment not exceeding six months, or a fine of £100 or both (s. 1 (1)). On a charge of an offence under this section the wife or husband of the accused shall be competent to give evidence at every stage of the proceedings whether for the defence or prosecution and whether the accused is charged solely or jointly with any other person; but this is subject to the provision that the wife or husband shall not be compellable to disclose any communication made to her or him during the marriage by the accused; and the failure of husband or wife to give evidence shall not be made the subject of comment by the prosecution (s. 1 (2)). This subsection shall not affect section 1 of the Criminal Evidence Act, 1898, or any case where the wife or husband of the accused may at common law be called as a witness without the consent of the accused. References in the Children and Young Persons Act, 1933, except in section 15 (which relates to the competence as a witness of the wife or husband of the accused), to the offences mentioned in the First Schedule to that Act, shall include offences under this section (s. 1 (3)). Offences under this section shall be deemed offences against the person for the purpose of section 3 of the Visiting Forces Act, 1952 (which restricts the trial by United Kingdom courts of offenders connected with visiting forces) (s. 1 (4)).

Section 2 increases the maximum term of imprisonment to which a person is liable under the Sexual Offences Act, 1956, if convicted on indictment of an attempt to have unlawful sexual intercourse with a girl under thirteen, or of an indecent assault on a girl under that age, to (a) in the case of such an attempt seven years, and (b) in the case of an indecent assault to five years. In the case of a person convicted of attempted incest with a girl who is stated in the indictment and proved to have been at the time under thirteen, the increased maximum sentence shall apply in the same way as it applies to a person convicted of attempted unlawful sexual intercourse with a girl under thirteen, *i.e.*, seven years' imprisonment.

The Act does not apply to offences committed before June 2, 1960, the date when the Act was passed. The Act does not extend to Scotland or Northern Ireland.

Civil Aviation

CIVIL AVIATION (LICENSING) ACT, 1960 (8 & 9 Eliz. 2, c. 38). Operative on such date or such dates in respect of different sections, as the Minister of Aviation may appoint. This Act prohibits certain flying except under a licence or other authority and deals with various other matters arising from this prohibition. Section 7 prohibits any aerial advertising or propaganda save in such circumstances as the Minister may prescribe; and provides that any person contravening this prohibition shall be guilty of an offence for which he shall be liable on summary conviction (a) on a first conviction to a fine not exceeding £100, (b) on any other occasion to a fine not exceeding £200 or to imprisonment for up to three months, or both.

London Traffic

By an Order made under the Road Traffic Act, 1956, parking places with parking meters are to be introduced in the Borough of Holborn. The location of these parking places is described in the Schedule to the Order, and the Order provides for the times and days during which the parking places are to be in operation, prescribes the type of vehicles which may be parked there, the periods for which the vehicle may be left there and the charges which the Holborn Council are empowered to make, and the general method of operation of the parking places. Operative for preliminary purposes, to enable the Council to acquire the sites and carry out works, on July 7, 1960, and for all other purposes on October 3, 1960. PARKING PLACES (HOLBORN) (NO. 1) ORDER, 1960 (S.I. No. 1132) (1s.).

For penalties for contraventions, see section 22 of the Road Traffic Act, 1956.

The following Order prohibits cycling in certain pedestrian subways: S.I. No. 1098 (Hammersmith) (2d.).

The following Order imposes restrictions on the weight of vehicles using certain routes: S.I. No. 1131 (Richmond) (2d.).

The following Order prohibits cycling on certain footpaths: S I. No. 1048 (Edmonton) (2d.).

A speed limit of 50 m.p.h. is imposed on the driving of mechanically propelled vehicles on certain lengths of Trunk Road in the London Traffic Area specified in the Schedule to the Regulations. Operative June 3, 1960. LONDON TRAFFIC (50 m.p.h. SPEED LIMIT) REGULATIONS, 1960 (S.I. No. 896) (3d.).

For penalties for contraventions, see section 10 of the Road Traffic Act, 1930, as amended by section 2 (2) of the Road Traffic Act, 1934.

Police

Certain benefits payable to the dependants of special constables are increased with effect from August 1, 1959. SPECIAL CONSTABLES (PENSIONS) ORDER, 1960 (S.I. No. 1063) (3d.).

Pensions payable to or in respect of retired members of the civil staffs employed under the Commissioner of Police of the Metropolis, or under the Receiver for the Metropolitan Police District, and retired members of the staffs of the Metropolitan Magistrates' courts may, by virtue of this Order, be increased in the same way as those payable to or in respect of persons formerly in the Civil Service of the State under the Pensions (Increase) Act, 1959. The Order is made to take effect from August 1, 1959.

METROPOLITAN POLICE STAFFS (INCREASE OF SUPERANNUATION ALLOWANCES) ORDER, 1960 (S.I. No. 1099) (3d.).

Revenue

The list of banks and other persons authorised to deal in gold and foreign currency, and the list of authorised depositaries with whom certain securities are required to be deposited under the provisions of the Exchange Control Act, 1947, are revised, and all previous Orders are replaced. Operative July 15, 1960. EXCHANGE CONTROL (AUTHORISED DEALERS AND DEPOSITARIES) ORDER, 1960 (S.I. No. 1151) (4d.).

For penalties for contraventions, see Schedule 5 to the Exchange Control Act, 1947.

Road Traffic

The Traffic Signs General Directions, 1957 (S.I. 1957, No. 13), as amended, are further amended. The principal changes are: (1) directions are given as to the placing of certain of the new traffic signs prescribed by the Traffic Signs (Amendment) Regulations, 1960 (para. 2 (*a*)); (2) that part of the direction contained in para. 16 of the 1957 Directions requiring that the legend on the sign "children crossing ahead" shall be visible to approaching drivers only when a school crossing patrol is on duty in the vicinity of the sign, is no longer to apply (para. 2 (*b*)); (3) the direction contained in para. 21 of the 1957 Directions (which requires that certain light signals may be placed only at sites approved by the Minister or the Secretary of State) is amended (a) so as to provide that it does not apply to the new flashing red light signals prescribed by the Traffic Signs (Amendment) Regulations, 1960, when those signals are provided at or near a level crossing in pursuance of an order authorising special safety arrangements at the crossing made by the Minister under section 66 of the British Transport Commission Act, 1951, and (b) to provide for the direction in which light signals are to face, for the colouring of the posts used to support light signals and, in the case of light signals prescribed by paragraph 2 of Regulation 27 of the Traffic Signs Regulations, 1957, for the colouring of the head of the signal which encloses its lamps (para. 2 (*c*)); (4) a direction is given that the new light signals may be placed on or near a road only if the mechanism of the signals is of a type approved by the Minister or the Secretary of State (para. 2 (*d*)); and (5) amended directions are given as to the colouring of posts used to support traffic signs (paras. 2 (*e*) and (*f*)). Operative July 15, 1960. TRAFFIC SIGNS GENERAL DIRECTIONS, 1960 (S.I. No. 1096) (3d.).

Traffic signs are prescribed and local authorities in England and Wales are under a duty to erect them in their areas, for the purpose of ensuring that guidance is given to drivers of motor-vehicles as to whether or not a speed limit of 30 m.p.h. or 40 m.p.h. applies on a length of road. Directions are given by the Minister of Transport with respect to the erection of these signs. Operative August 4, 1960. TRAFFIC SIGNS (SPEED LIMITS) REGULATIONS, 1960 (S.I. No. 1124) (10d.); SPEED LIMITS (ENGLAND AND WALES) DIRECTIONS, 1960 (S.I. No. 1125) (3d.).

New provision is made with regard to the periods for which an excise licence may be taken out in respect of a mechanically propelled vehicle and as regards the duty payable in respect of a licence for any such period. As from October 1, 1960, a licence for any vehicle may be taken out for any period of 12 months, the rate of duty being that appropriate to the vehicle, and in the case of a vehicle for which the annual rate exceeds £3 the licence may be taken out for any period of 4 months the rate being one-third the annual rate plus 10 per cent. of that amount, calculated to the nearest shilling. Operative June 15, 1960. ROAD VEHICLES (PERIOD LICENSING) ORDER, 1960 (S.I. No. 1023) (3d.).

Regulations made under section 65 of the Road Traffic Act, 1960, make provision for the examination of certain motor-vehicles, specified in Regulation 3, for the purpose of ascertaining whether certain statutory requirements relating to motor-vehicles, their accessories and equipment are complied with, and for the issue of a test certificate where the requirements are complied with or the issue of a notification of refusal of such a certificate. The vehicles to which the Regulations apply are, subject to certain exceptions, heavy motor-cars, motor-cars or motor-cycles; the exceptions include track-laying vehicles, goods vehicles over 30 cwt. unladen weight and public service vehicles adapted to carry 8 or more passengers. Regulations 4 to 8 relate to the appointment of persons to act as "authorised examiners" for the purpose of carrying out examinations, and impose conditions to be complied with by such examiners. Persons wishing to have a vehicle examined may apply either to an "authorised examiner," a designated council or the Minister of Transport in the manner set out in Regulation 10. Regulation 11 specifies certain cases where an examination may be refused (*e.g.*, if the vehicle is in a filthy condition, or where the person submitting the vehicle refuses to produce the registration book if requested to do so). Regulation 12 and Schedule 3 provide for the manner in which the examinations are to be carried out, and Regulation 13 specifies the responsibilities of the examiners for damage to vehicles or third-party liabilities arising out of the carrying out of the examinations. Regulations 14 and 15 and Schedule 4 deal with the form of test certificates or notifications of refusal, and Regulation 16 and Schedule 5 prescribe the fees payable for the examination. Persons aggrieved by the refusal of a test certificate may appeal to the Minister under Regulation 17, within the time and subject to the conditions there laid down, on payment of the fees prescribed under Regulation 18. The remaining Regulations and Schedule 6 provide for various matters arising out of the application of the Regulations, including the removal of vehicles from testing stations, the records to be kept and returns to be furnished by authorised examiners and designated councils, the issue of duplicate test certificates, the inspection of testing stations, apparatus and records, and the withdrawal of authorisation from examiners. The statutory requirements which are vested under these Regulations are those specified in Schedule 9, and are certain requirements of the Motor Vehicles (Construction and Use) Regulations, 1955, as amended, relating to the brakes, steering gear and lighting equipment and reflectors of motor-vehicles. Operative September 12, 1960. MOTOR VEHICLES (TESTS) REGULATIONS, 1960 (S.I. No. 1083) (1s. 6d.).

Scotland

The provisions of the Rivers (Prevention of Pollution) (Scotland) Act, 1951 (14 & 15 Geo. 6, c. 66), are applied to the tidal waters of the Firth of Forth specified in the second schedule to that Act, with the exception that the provisions of section 22 (1) (*a*) and (*b*) shall not apply to the ordinary use for the purpose of sanitation on vessels in the said tidal waters of sanitary appliances from which polluting matter passes or can pass into such waters. Operative August 1, 1960. FIRTH OF FORTH (PREVENTION OF POLLUTION) (TIDAL WATERS) ORDER, 1960 (S.I. No. 1119) (2d.).

For penalties for contravention, see section 22 of the Rivers (Prevention of Pollution) (Scotland) Act, 1951.

Certain benefits payable to the dependants of special constables are increased with effect from August 1, 1959. SPECIAL CONSTABLES (PENSIONS) (SCOTLAND) REGULATIONS, 1960 (S.I. No. 1050) (3d).

Books and Periodicals

Book reviews:

Clinical Toxicology. By C. J. Polson and R. N. Tattersall: English University Press. 1960. 582 pp. and (Index 7 pp.). 42s. net.

The task of producing a fairly comprehensive textbook of one volume covering the whole field of forensic medicine and toxicology has long been unmanageable. Professor Polson's departure from convention in excluding toxicology from his book *Essentials of Forensic Medicine* published in 1955 was fully justified in that it enabled him to produce a most readable and comprehensive book on the subject. We were, however, promised in the preface to that work that a book concerning clinical toxicology was in preparation and this is the book now under review. This time the process of limitation of subject-matter has again been successfully achieved in that toxicological analysis and industrial poisoning, aspects of interest only to the specialist, have been given only passing reference, with the result that a comprehensive yet manageable book on the commoner poisons has emerged.

It must be impossible to write a readable book on toxicology as such works must necessarily be encyclopaedic in nature. However, Professor Polson and Dr. Tattersall are to be congratulated on having almost achieved the impossible. This is a reference work which should be available to all persons concerned with the detection of crime. Detailed studies of the symptoms and differential diagnosis of poisoning are given and the accounts are copiously illustrated by case histories most of which are of considerable forensic interest. A large number of references are given.

J. D. J. HAVARD.

Handbook on the Criminal Procedure Act, etc. By W. E. Cooper and B. R. Bamford, assisted by M. Marcus: Jute & Co. 1960. 303 pp. 45s. net.

Judging by this book, the practitioner in South African criminal law has a far easier task to master the technicalities of court procedure than has his English confrère. One statute in South Africa provides a code which, in England, can only be found scattered over a number of Acts of Parliament, a substantial part of the common law and a host of decided cases. The Criminal Procedure Act, with which this book is mainly concerned, begins with the initiation of prosecutions, goes, in logical order, through the proceedings preparatory to the trial, to the trial itself (including the rules of evidence) and concludes with possible verdicts, sentences and appeals. It covers all offences from murder down to those which may be met by " ticket " fines. It contains codes for both higher and lower courts; and, where a special procedure is considered necessary for some offence, that also is to be found in this statute (*e.g.*, that a general deficiency may be charged in larceny; and that a person charged with receiving may be convicted of theft, and vice versa).

Footnotes show, however, that, as in England, laws can never be framed so that it is impossible for lawyers to suggest more than one interpretation of their wording. References to decided cases are almost as numerous as they would be in an English textbook. But, very surprisingly, the footnotes do not give any indication as to what the cases referred to actually decided; the cases are simply listed under the relevant section of the Act, without any explanation or comment. This may be usual in South African textbooks, but it must surely lead to time being wasted in referring to reports which turn out to have no bearing on the particular point being investigated. The work cannot, for this reason, be treated by the English practitioner as a convenient reference book for matters of South African criminal law with which he may be concerned.

To anyone in this country its main interest must be its revelation of profound differences from and surprising correspondences with our own law. In a few matters of evidence admissibility is specifically declared to depend on the decisions of " the Supreme Court of Judicature in England " in similar cases. There appear to be no other direct references to English law, but much of the South African code has clearly been influenced by, and embodies the main features of our criminal procedure. The big divergences are in basic constitutional principles; the power of the executive *vis-à-vis* the judiciary is very much greater in South Africa than here. The area attorney-generals, who are the prosecuting authorities, are under the direct control of the Minister of Justice; and, in some respects, the attorney-generals are in control of the magistrates. An attorney-general may decide to enter a *nolle prosequi* at any stage, including after conviction; he may even order the release of a person who has been sentenced; and, conversely, he may order a magistrate to re-arrest and commit for trial a defendant who has been discharged by the magistrate. The Minister of Justice may interfere with the higher judiciary; he has power to direct that a trial be without jury in certain cases; and, on the application of an attorney-general, he may set up special criminal courts to deal with specified offences.

In a variety of other instances the South African criminal code exhibits a strange mixture of " advanced " and " reactionary " ideas—from the point of view of our law. A police officer of the rank of sergeant or upwards may have any person he has arrested examined by a psychiatrist. Sentences by lower courts of three months' imprisonment, whipping, or a fine exceeding £50 are subject automatically to review by the appeal court. On the other hand, punishments are severe; whipping is possible for many offences and compulsory for some; imprisonment may be solitary and with " spare diet "; and " periodical imprisonment " covering a total of from 100 to 1,000 hours may be ordered. The death sentence may be passed for rape, robbery and housebreaking. Probation appears to be applicable only to those under twenty-one, although a sentence suspended on conditions may be imposed in the case of an adult.

The onus of proof is put on the defendant in a number of instances; but a confession to a police officer is not admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate.

It is justifiable homicide for a police officer to kill a person who escapes after arrest for an offence which carries a possible punishment of six months' imprisonment. But the age limit for treatment as a juvenile offender in the children's courts is as high as nineteen; and up to that age an offender may be remitted to the children's court as a "care and protection" case.

There is surprisingly little indication in the Criminal Procedure Act of the "colour" problem. It is, however, laid down that native marriages are not to be recognised for the purpose of entitling one spouse to refuse to give evidence against the other; and any husband or wife is a compellable witness in prosecutions under the Immorality Act. Perhaps, also, it is the coloured population which is aimed at in the provision that not only the finger and palm prints, but, in addition, the foot prints of defendants may be taken.

These are only a few of the points of interest to an English lawyer in this book. He will find reference to any particular topic very easy, for the index so thoroughly covers the ground that it occupies one-fifth of the pages. In certain matters of procedure the reader may very well feel that South African law is an improvement on our own. At any rate, it is refreshingly clear cut and comprehensive.

A. E. JONES.

Through Seven Reigns (A History of the Newport Police Force). By Islwyn Bale. 136 pp. (index and appendices 11 pp.). 7s. 6d. net.

The author, who is an Inspector of the Newport (Mon.) Borough Police, is to be congratulated on a work, which goes further than being a simple history of his force. It is more in the nature of a social history of the town over the past century, and contains some fascinating details of the growth of the borough.

It is obvious that Mr. Bale has spent a considerable time on his research and he tells his story in a most interesting manner. One can only congratulate the Corporation of Newport and certain advertisers, who have so subsidised the publication that such a beautifully produced and illustrated work can be published for such a trifling amount.

It is a book of interest to any student of police history.

HUGH DUDLEY.

Books received:

Pioneer in Criminology. Edited by Hermann Mannheim. London: Stevens. 1960. 394 pp. (index 7 pp.). 45s. net.

Restitution to Victims of Crime. By Stephen Schafer. London: Stevens. ix and 130 pp. 25s. net.

The Detection of Secret Homicide. By J. D. J. Hovard. Edited by L. Radzinowicz. Cambridge Studies in Criminology, Vol. XI. London: Macmillan. 1960. 253 pp. 35s. net.

Most of My Murders. By John Parris. London: Frederick Muller, Ltd. 1960. 288 pp. 18s. net.

Hume, Portrait of a Double Murderer. By John Williams. London: Heinemann. 1960. 248 pp. 21s. net.

Readers' digest:

Homicide: Psychiatric aspects of diminished responsibility in murder. 1960. Medico Legal Journal 92.

Practice and Procedure: Second or subsequent offence: 124 J.P. Review 495.

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Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review,* 11 *New Fetter Lane, E.C.4. Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

THE
CRIMINAL LAW
REVIEW

October 1960

This special issue on violence

Since the war public attention has been turned to violence. Statistics show that there has been an increase in the number of crimes of violence committed in this country and this is regarded as a major social problem of our age. This special issue is, therefore, designed as a contribution to the study of the problem from different aspects. The first article deals with the social and family aspects of the subject and is written by Mr. Herschel A. Prins, a probation officer.

One disturbing factor has been the growth of racial disturbances and we, therefore, include a brief account by Captain Popkess of the racial disturbances in Nottingham and how these were dealt with by the police.

Whether the increase in violent crime can be stopped and the trend reversed will, to some extent, depend on the views taken by the courts, readers will recall the remarks made by Mr. Justice Salmon in sentencing youths to four years' imprisonment after riots at Notting Hill.[1] Our third article, therefore, examines the sentencing policy of the courts and is written by Dr. T. E. James.

The fourth special article in this issue deals with the treatment in prison of violent criminals and is written by Mr. Gordon Hawkins, Assistant Principal of the Prison Service Staff College at Wakefield. Mr. Hawkins' experience in charge of a Long Term Young Prisoners Centre particularly qualifies him to write on this subject.

The final special article is one in our series on forensic science and deals with blood.

Violence and the law

In assembling this issue it was decided that no special article would be included on the law, since a glance at our pages will show that such articles are traditional to this *Review*. This is not to say, however, that the law on the subject can be regarded with complacency. Whilst it is true that the law covers violence from the slightest assault to capital murder, there are many aspects of it which can be criticised as being unnecessarily complicated or as not being in keeping with modern views.

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[1] [1958] Crim.L.R. 709.

Law enforcement is not made easier by the extreme complication of the law, and by the piecemeal amendment which has taken place through the years. The basic statutes are the Offences against the Person Act, 1861, and the Malicious Damage Act, 1861. Many instances of anachronisms are to be found throughout these Acts, for example, it is a misdemeanour to assault, strike or wound any magistrate, officer, etc., concerned in the preservation of a wreck,[2] and this is punishable by a term of imprisonment up to seven years. One may be forgiven for wondering whether there is any particular virtue in keeping on the Statute Book a section dealing specifically with an assault with intent to obstruct the sale of grain,[3] or a section specifically dealing with an assault hindering or preventing any sailor, keelman or caster executing his lawful trade.[4] In each case the penalty is a fine or imprisonment for a term not exceeding three months, and it is suggested that these special sections no longer serve any useful purpose. Further, a simplification of the law relating to causing grievous bodily harm contained in sections 18 and 20 of the Offences against the Person Act, 1861, would be an advantage.

The Malicious Damage Act, 1861, deals with a very wide number of offences, ranging from arson to destroying hop-binds, the latter punishable by a term of up to fourteen years (s. 19). This section may be contrasted with section 39 under which destruction of a work of art is punishable by imprisonment not exceeding six months.

These are but instances of matters which are long overdue for amendment and it is suggested that the treatment given to sexual offences, which resulted in the Sexual Offences Act, 1956, should now be given to these topics of offences against the person and malicious damage with a view to a simplification of the law and the removal of anachronisms.

D. P. P. v. Smith

It is appropriate to record the House of Lords decision in

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[2] Offences against the Person Act, 1861, s. 37.

[3] *Ibid.* s. 39.

[4] *Ibid.* s. 40.

D. P. P. v. *Smith* [5] in the editorial pages of this special issue on violence.

A constable asked Smith to stop the car he was driving. When Smith accelerated, the constable clung on, and, the car having pursued an erratic course for a short distance, was thrown off into the path of an oncoming vehicle. He died from his injuries. The Court of Criminal Appeal substituted a conviction of manslaughter for that of capital murder recorded at the trial. This was mainly on the ground that Donovan J. in effect directed the jury to apply an objective test on the question of Smith's intent—asking what Smith as " a reasonable man " must have contemplated as likely to happen to the constable and not what Smith actually intended or foresaw.

The House of Lords has restored the conviction of capital murder. Space does not permit a detailed analysis of Lord Kilmuir's opinion, in which four other learned Lords concurred; but the following propositions may be offered as having been affirmed, among others, in the decision:

(1) A person is guilty of murder if he kills by an unlawful act " aimed at " the deceased, so long as " an ordinary man capable of reasoning who is responsible and accountable for his actions " would foresee serious harm as the natural and probable consequence of the act.

(2) Liability in such a case does not depend upon what the actor intended or foresaw. His state of mind is relevant only to the extent that the act must be voluntary and for the purpose of the defences of insanity, diminished responsibility and provocation.

A reasonable man is " presumed " to intend the natural and probable consequences of his acts. In criminal law the reasonable man is, in their Lordships' view, the " ordinary man " described above. The decision renders the " presumption " in this context irrebuttable. Because I am not insane or of diminished responsibility (provocation is a special case that may be ignored) I am conclusively regarded as reasonable. It is idle for me to explain that I was sick or frightened, or that I am always stupid, and that I was at the crucial time somewhat inferior to your " ordinary man."

It is with all proper respect that one expresses disappointment at this highly authoritative decision. Liability for murder should flow from the " malice " present in the prisoner's mind and not depend on the automatic application to the external facts of some artificial criterion. We have abolished the old forms of " constructive malice " ; now the House of Lords has affirmed that murder has all along been a constructive crime in some of its aspects. In justification of the decision it has invoked the authority of Court of Criminal Appeal decisions that one had long waited for the highest tribunal to overthrow. *R.* v. *Ward*,[6] in particular, has been rejected by the High Court of Australia[7] and castigated by a number of commentators in this country; the affirmation by the House of Lords of the principle of that decision is an unhappy event for English criminal law.

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[5] [1960] 3 W.L.R. 546; in C.C.A. *sub nom. R.* v. *Smith* [1960] 3 W.L.R. 92; [1960] Crim.L.R. 491.

Magistrates' Courts in London

A committee has been set up by Mr. Butler, the Home Secretary, and Lord Kilmuir, the Lord Chancellor, "to consider and report on what measures are required, in the light of present conditions, to facilitate the integration of the Metropolitan Magistrates' Courts, and the Petty Sessional Courts in London, as recommended by the Committee on Courts of Summary Jurisdiction in the Metropolitan Area, 1937, whether by way of

(a) legislation,
(b) administrative action, or
(c) the provision of new court buildings, or any change in the use of such buildings."

Biographical notes on the authors

GORDON HAWKINS, B.A., sometime Fellow of the University of Wales, was for some years Assistant Governor at Maidstone and Wakefield prisons, and is now Assistant Principal of the Prison Service Staff College at Wakefield.

DR. T. E. JAMES, M.A., B.C.L., PH.D., Barrister-at-Law, was a Lecturer at King's College, London, from 1947 to 1958, and is now a Reader at that University. One of his special subjects is criminology.

DR. G. B. MANNING, B.SC., M.B., CH.B., F.R.I.C., is a Consultant Pathologist at the Royal Infirmary, Bolton.

CAPTAIN ATHELSTAN POPKESS, C.B.E, retired Chief Constable of Nottingham, was the originator of the traffic warden system, which is now in force.

HERSCHEL PRINS is an Assistant Lecturer in the Child Care Department of the North Western Polytechnic, London. Previously he worked as a probation officer in Middlesex, he was a psychiatric social worker at Stamford House remand home from 1957–58. He is a member of the Executive Committee of the Howard League for Penal Reform.

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[6] [1956] 1 Q.B. 351; [1956] Crim.L.R. 203.

[7] *Smyth* v. *R.* (1957) 98 C.L.R. 163.

Social and Family Aspects of Violent and Aggressive Crime

By HERSCHEL A. PRINS [1]

Probation Officer and Psychiatric Social Worker

> "Crime is not a disease. It is sometimes attributable to a mental disease and mental defectiveness. It occurs when self-regarding behaviour replaces social behaviour and threatens social security. . . ." Sir Norwood East, *Society and the Criminal.*

A Background Comment

Of all forms of criminal behaviour, crimes of violence or marked aggression tend to be discussed with the greatest degree of emotion, and few people can remain entirely objective in their assessment of the situation. The reasons for this lack of objectivity are not altogether clear, but it may be partly explained by the fact that man seems essentially to be an aggressive creature, and only by much external control or sanction does he learn in time to come to terms with his basic aggressive drives. It may be, that, because this need for control is so great any form of violence in others is seen as a great threat to our own precariously balanced state; because of this we find ourselves condemning in others what we fear most in ourselves.

There has been a considerable increase in recent years in nearly all crimes of violence with the exception of murder and attempted murder. This can be seen more easily from the following table.[2]

TABLE 1

Period 1950–58

	1950	1951	1952	1953	1954	1955	1956	1957	1958
Murder ...	122	123	136	131	137	125	148	151	124
Attempted murder	183	126	155	129	176	169	162	158	190
Felonious wounding	976	1,078	1,027	981	1,048	1,042	1,227	1,397	1,565
Malicious wounding	4,201	4,445	4,873	5,111	5,425	5,884	7,039	8,192	9,174
Robbery ...	1,021	800	1,002	980	812	823	965	1,194	1,692

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[1] The author is an Assistant Lecturer in the Child Care Department, North West Polytechnic, London.

[2] These figures have been abstracted from the *Criminal Statistics* over the years and supplied by courtesy of the Howard League for Penal Reform.

The general reasons advanced for the increase in violent criminality are not always based on an accurate appraisal of the facts. In the years after the war, it may have been reasonable to assume that men [3] taught to kill in a methodical and calculated way should carry over some of this teaching on their return to the strains and stresses of civilian life. Against this however one must advance the theory that any such latent aggressive tendencies should have found abundant opportunity for sublimation in warfare. Probably the truth lies somewhere between the two theories. In addition to these factors, there seems little doubt that modern man lives in a society fraught with tension and uncertainty, where recognition and tacit acceptance are given to the means of mass destruction. This must create great uncertainties and stresses not only in the minds of mature and experienced adults, but to a much greater degree in the minds of the younger members of society. Small wonder therefore, that they seem uncertain, impulsive, apparently aggressive, and lacking in purpose. This state of affairs is rendered even more complex because man has needed, in a much more organised society, to defend himself from his aggressive impulses with an ever increasing number of sanctions, controls, and regulations. It is therefore not altogether surprising that many people find themselves in a state of extreme uncertainty concerning modern social controls. Although the present writer would be the last to single out any specific factor as contributory to the present increase in violence, he feels that in an age already beset by uncertainty and tension, the tacit acceptance of many forms of violence on the screen, the stage, and some literary works does not augur well for the future. It is against this general background that we must view the present trends in violent crime. It will be appreciated that within the confines of a short paper the various categories of offence and offender can only be touched upon very briefly.

Definition of Crime and Violent Crime

It is necessary at this stage to offer some definition of " crime " and " violent crime " for the purposes of this paper. Bonger wrote that " crime is a serious anti-social action to which the state reacts consciously by inflicting pain (either punishment or correctional measures)," [4] whilst Michael and Adler state that " the most precise and least ambiguous definition of crime is that which defines it as behaviour which is prohibited by the criminal code." [5]

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[3] Unless otherwise stated, all references in this paper are to male offenders.

[4] W. Bonger, *Introduction to Criminology*, 1936.

[5] Michael and Adler, *Crime, Law and Social Science* (London, 1933).

B. A. Wortley seems to have combined the elements of the above two definitions when he states that " a crime is an offence against the law, and is usually an offence against morality, against a man's social duty to his fellow members of society: it renders the offender liable to punishment." [6] For the specific purpose of this paper violent crime will be defined as any seriously anti-social act that contravenes the criminal law and is accompanied by violence as classified in the *Criminal Statistics*. In addition, the present writer feels that such offences as malicious damage and violence against the self (suicide and attempted suicide) often have similar psychopathology to the more commonly accepted crimes of violence, and for this reason they have been included in this study.

A word of caution is necessary concerning the interpretation of official statistics. It should be remembered that little can be learned from these as to the *nature* of a violent or aggressive crime.[7] Many cases that fall into the malicious wounding category may be quite trivial, and there are cases of manslaughter that are in fact far less serious than the classification merits. Two examples are offered in illustration of this point.

Case 1. A young man aged twenty-three was known by family and friends to be of uncertain temper. For some time he had been courting a young woman he had met in a dance hall. She was something of a flirt, and evidently took some pleasure in taunting him from time to time. During one of these " episodes " at his home he warned her that unless she stopped he would lose his temper. Seeing that his warning had not the slightest effect, he picked up a cup and threw it at her, inflicting a nasty flesh-wound on her forehead. He was charged with malicious wounding, convicted, and placed on probation. Although his temper always remained uncertain (if provoked) he did not repeat the offence. The author feels that there are many more similar cases where although a charge of *malicious* wounding is preferred the circumstances are not of a serious nature.

Case 2. Three labourers of previous good character were committed for trial at an assize court charged with robbery with violence. The facts were that following some altercation concerning the delivery of coal they were charged with robbing the coal vendor. When the facts were outlined at the assize court, the learned judge took the view that the facts could not possibly substantiate such an indictment and ordered the charge to be reduced to one of *common assault*.

One should also bear in mind the need to distinguish between a *crime of violence* and a *violent crime*. For instance, a burglary may take place under particularly violent circumstances, or a serious case of malicious damage may well be a symbolic substitute for a grave attack on an individual (see discussion of wilful damage offences below). Similarly, the offence of indecent assault may carry with it varying degrees of violent conduct—from the serious assault on the one hand to the light touch on the thigh under cover of darkness in, say, a cinema. Two cases illustrate this point.

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[6] B. A. Wortley, " The English Law of Punishment," in *Modern Approach to Criminal Law* (London, 1955).

[7] The term " aggressive crime " is taken from Sir Norwood East's classification in *Society and the Criminal*, H.M.S.O., London, 1949.

Case 3. A married man of previous good character and personality aged thirty-four was convicted of indecently assaulting a small girl in a bus by placing his hand on her thigh. His movements were observed by the bus conductor and he was apprehended and charged. No very serious damage had been done to the child and he was placed on probation. It transpired that he had been having serious matrimonial difficulties, and it seemed fairly certain that the stress occasioned by these had contributed to his criminal act.

Case 4. A young unmarried male of twenty-four was convicted of a series of indecent assaults on women. As they were over sixteen the case had to be tried at quarter sessions. The facts were that he had gone out on his bicycle at dusk and followed a number of young women along a lonely country lane. Coming up behind them he attempted to pull them off their cycles whilst making various obscene suggestions. He was of previous good character but had suffered much deprivation of affection in childhood (a not uncommon feature of the indecent assault offender's personality), and a psychiatrist informed the court that he was a borderline mental defective. Because of these factors he was placed on probation, but the seriousness of his assaults could have earned him a term of imprisonment.

Specific Aggressive Crimes

It is now proposed to deal with certain crimes of violence in a little more detail.

Murder

The criminal statistics indicate that the number of murders each year remains much about the same.[8]

It is unfortunate that there is not a great deal of information available about the backgrounds or later histories of murderers. This is due no doubt to the fact that so many of them were executed before the passing of the Homicide Act, 1957, and we were thus deprived of revealing clinical material. No less an authority than Professor Sir David Henderson has said of phsychopathic murderers, " if our ethical code feels justified in sending them . . . to the gallows then let it do so, but at the same time let it be clearly understood that such persons are driven by what may be called their collective unconscious to deeds of violence which are as uncontrollable as a tidal wave."[9] An American authority, Jack Kevorkian has argued the case for murderers being given a choice between the death penalty and allowing themselves to be the subjects of scientific research into this form of crime.[10] Dr. Neustatter has put the offence of murder into some perspective for us when he says, " All of us have primitive instincts and passions. Those who are honest with themselves will admit that there have been occasions when they have wished someone dead . . . but the peculiar thing is that, in spite of our primitive instincts, our faults, jealousies and tempers, only about one hundred persons per annum are actually arraigned for murder. . . ."[11]

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[8] See Table 1.

In 1956, the *Observer*[12] published an account of eighty-five men and women executed for murder between 1949 and 1953. The present writer has attempted to analyse eighty-three of these cases (two women excluded) for occupational status. The analysis is only a rough one since not all the occupational groups were readily classifiable. They are as follows:

TABLE 2

Semi-skilled (miners, etc.)	*Skilled* (Professional or distinctly artisan)
24	8
Unskilled (Labourers, etc.)	*Not stated*
39	12

An attempt was also made to ascertain the average age of these offenders. This worked out at just over twenty-nine years. The youngest was eighteen and the eldest fifty-six.

Regarding mental state, Sir Norwood East[13] found that of 474 persons tried for murder between 1939 and 1945, 209 (44 per cent.) were found to be insane. In a study reported to the Royal Commission on Capital Punishment[14] it was shown that more murders were committed on Saturdays than on any other day, and that most murders were committed in the more densely populated districts. Sir John Macdonnell[15] who made an exhaustive study of the subject, has stated that murder " is an incident in miserable lives in which disputes, quarrels, angry words, and blows are common . . . the short history . . . might be summed up thus: domestic quarrels and brawls; much previous ill treatment; drinking, fighting, blows; a long course of brutality and continued absence of self-restraint. This crime is generally the last of a series of acts of violence. . . ." He adds, however, that "there is . . . a clearly marked class of murders of *rare occurrence* [present writer's italics] the motive of which is robbery committed by habitual criminals, and forming the climax and usually the termination of a career of crime. . . ." In the U.S.A. Wolfgang,[16] studied 588 criminal homicides between 1948 and 1952 and found that (as in England) the peak of criminal homicide offences occurred at weekends (32 per cent. on Saturdays as opposed to 7 per cent. on Tuesdays). Stabbings accounted for 39 per cent. of the crimes, shootings 39 per cent., and beatings 22 per cent. Wolfgang also found that 64 per cent. of the offenders he studied *had previous police records*, many for aggravated forms of assault. This, and the comments by Macdonnell, tend to refute the contention that murder is often an isolated incident in a previous good character. These findings are also confirmed in a study by Dr. T. C. N. Gibbens.[17] Regarding differences in personality development between murderers and their brothers, Palmer[18] studied fifty-one murderers and their nearest age brothers. He found that the murderers seemed to have a higher frustration rating than their brothers and emphasised the theory that pronounced frustration in infancy may have an important bearing on later conduct. He bases this on Dollard's assumption that frustration in the early years can lead to inward or outward aggression. He emphasises, however, the limited nature of his study. His findings tend to be supported by the earlier work of such authorities as Bowlby and Stott who found that certain individuals are more easily prone to breakdown under stress than others.

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[9] Evidence to the Royal Commission on Capital Punishment, Cmnd. 8932, H.M.S.O., 1953.

[10] Jack Kevorkian, *Journal of Criminal Law, Criminology and Police Science*, Vol. 50, No. 1, 1959.

[11] Dr. L. Neustatter, *The Mind of the Murderer*, Christopher Johnson, 1957. See also his book *Psychological Disorder and Crime*, Johnson, 1953. Both works give interesting accounts of the psychopathology of murder.

[12] *Patterns of Murder*: A Five Year Survey of Men and Women Executed in England and Wales (1949–1953). By " Vigil " of the *Observer*, April 1956.

[13] *Op. cit.*

[14] *Op. cit.*

[15] Quoted in the Report of the Royal Commission on Capital Punishment.

In short, it seems that the "average" murderer (if he can be so labelled) seems to come from the same kind of background as many other criminals. We should not be misled into applying criteria of gross abnormality to all murderers just because these features may be seen in a few notorious cases.

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[16] Marvin E. Wolfgang, *Patterns in Criminal Homicide*, University of Pennsylvania Press, 1958.

[17] "Sane and Insane Homicide," *Journal of Criminal Law, Criminology and Police Science*, Vol. 49, No. 2, 1958.

[18] Stuart Palmer, "Frustration and Murder," *Journal of Criminal Law, Criminology and Police Science*, Vol. 50, No. 3, 1959.

Attempted murder

It has already been mentioned that care must be used in interpreting the statistics of violence. This is particularly true in cases of attempted murder when personal or family factors may play a very important part. Two cases are quoted in illustration.

Case 5. A young bank clerk of previous good character was charged with attempting to murder his aged mother by cutting her throat, and also attemping to murder his brother by hitting him over the head. The defendant then tried to commit suicide. It was ascertained that he had been getting increasingly depressed, with feelings of incompetence and unworthiness. Evidence was given at the assize court that this was a treatable condition and he was placed on probation with a condition that he should undergo psychiatric treatment as an in-patient. He responded well and made an excellent recovery. This case is quoted to illustrate that such offenders not infrequently come from excellent backgrounds, and also to show that even for very serious offences a *light penalty* may well be as effective (or more so) as a severe one.

Case 6. A man in his late forties was charged with the attempted murder of his wife by cutting her throat whilst she lay asleep. He was normally an extremely docile and placid individual, a carpenter by trade and a very good workman. It transpired at his trial that for some years his wife had carried on " business " as a prostitute, and, despite all her husband's entreaties refused to give up her way of life. In a fit of despair and anger he attacked her. In view of the extenuating circumstances, the trial judge saw fit to pass what was in fact a very light and purely nominal sentence. The man subsequently returned to live with his wife.

Violent and aggressive crimes—general

It may be of interest to compare the figures for crimes of violence in general between the years of 1938 and 1958.[19] It is also of interest to compare the number of offences for each age group.

TABLE 3

	Offences known to police	No. found guilty	Under 17	17–21	21–30	Over 30
1938	2,721	1,583	110	147	448	650
1948	5,183	3,183	225	380	1,189	1,054
1958	12,137	7,985	1,011	2,051	2,471	1,994

It is not possible to make a detailed comparison of the above figures since some of the classifications of various offences have changed in the twenty-year period (for example, the manslaughter figures would be diminished by the new offence of causing death by dangerous driving).

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[19] These figures do *not* include the offence of robbery with violence.

Social factors

Social factors can only be commented upon in a very general way. Hooton[20] found that rapists and other sex offenders tended to marry in excess of the total criminal population, and Goring[21] found that "the age distribution of offenders convicted of incendiarism, and other forms of wilful damage to property . . . , sexual offences, and crimes of violence against the person, are fairly similar to each other. Their respective marriage rates are in close accord." In connection with sex offences Bonger[22] has pointed out that many offenders in modern society grow up in an environment in which there is no possible sublimation of sex life. That the serious offence of rape can only be understood properly when all the circumstances are known, is illustrated by the following case.

Case 7. A young soldier aged nineteen was accused of raping a girl of about the same age. The facts were that he and the young woman had been drinking near his unit and he let his passions get the better of him. There was some evidence that the girl was not an altogether unwilling party to his attentions, but he was sent for trial and indicted for rape. He was a young man of previous excellent character, a very keen sportsman, of fine physique with no history of abnormality. His father had died some years earlier, but his mother, though kindly and very well intentioned, was not felt to have particularly high moral standards. This young man was of somewhat uncouth and "earthy" temperament and the trial judge felt able to take account of all the extenuating circumstances in the case. He was placed on probation and made an excellent response. As far as is known he has not been in any form of trouble since.

Employment and home circumstances

Howard Jones[23] finds that there is little evidence for supposing that employment has any bearing on aggressive offences, though it must be admitted that in certain cases a man desperate for food or shelter may resort to violent measures, but this is entirely a situational state of affairs. Regarding *early* home circumstances, Roper[24] found that offenders charged with violence to the person came from predominantly adverse home conditions, and Gibbens and Walker[25] found that although the cruel parents they studied might not have been subjected to physical cruelty themselves, if they had been subjected to "rejection," "indifference," or "hostility" this would tend to produce a cruel parent.

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[20] Hooton, *The American Criminal*, 1939.

[21] C. Goring, *The English Convict*, 1913.

[22] *Op. cit.*

[23] Howard Jones, *Crime and the Penal System*, U.T.P., 1956.

[24] W. Roper, "Survey of the Prison Population in 1948," *Brit.J.Delinq.*, Vol. I, No. 1, 1950.

[25] T. C. N. Gibbens and A. Walker, "Violent Cruelty to Children," *Brit.J. Delinq.*, Vol. VI, No. 4, 1956.

Violence and recidivism

Norval Morris[26] in a very careful and systematic study of thirty-two habitual criminals did not find a predominance of violence. In fact, of the thirty-two he found that only four had been convicted of an offence of violence *per se*. These findings tend to be confirmed by those of Morrice[27] who found that of fifty adult male recidivists in Peterhead prison, thirty-five had previous convictions for theft, nine for assault, three for sexual offences, and three for murder or manslaughter.

Not infrequently, it is found that a "mixed" picture exists in the background of the violent offender, comprising psychological, physical and social factors. It is often difficult to determine which predominate. The following case is quoted in illustration of this problem.

Case 8. A man aged twenty-eight was charged with causing grievous bodily harm to a young woman by hitting her over the head with an iron bar. The young woman was entirely unknown to him, and from the start he denied the offence emphatically despite a good deal of evidence to implicate him. He was committed for trial in custody charged with committing grievous bodily harm with intent, but at the assize court a plea of not guilty to the major charge was accepted and he was convicted on a lesser charge of unlawful wounding. His history was unusual. He had been before the juvenile court on a number of occasions, and after periods of probation had eventually been certified as a mental defective and sent to an institution where he remained for some years before being licenced to his mother. On one occasion he had been recalled during his licence period. At the time of his committal for trial he was examined by two very experienced physicians who came to the conclusion that he was no longer defective and in view of this his order for certification was discharged by the Board of Control. In view of these circumstances the judge made a probation order. His response to probation was only fair. He was an impulsive, erratic individual, who indulged in childish behaviour when under stress. The family background was interesting in that the parents were divorced, and the mother, though a very intelligent and competent woman, was rather cold and dominating. In addition a brother suffered from a disabling form of epilepsy. The whole family set-up was unusual and each family member exhibited some form of eccentricity. Shortly after his probation period was completed the defendant was charged with a particularly aggravated indecent assault on a small girl and was sent to prison. The above case is interesting, not only because of the intelligence factor involved, but because of the difficulty in assessing the relative importance of hereditary factors and environmental stresses.

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[26] Norval Morris, *The Habitual Criminal*, Longmans Green and The London School of Economics, 1951.

[27] J. K. W. Morrice, "Psychiatric Treatment of Habitual Criminals, " *Brit.J. Delinq.*, Vol. X, No. 1, 1959.

Few backgrounds are as complicated as the one quoted above. Often, the violent act is merely an outburst in a typically impulsive personality.

Case 9. A man of fifty was charged with committing grievous bodily harm to a workmate by breaking his jaw. Both men were labourers and following an altercation in which the defendant was called a very rude word, he lost his temper and probably hit harder that he had intended. He was a rough and ready individual, with one or two earlier convictions for drunkenness, and he had been in disciplinary trouble in his Army days for insubordination and assaulting a superior officer. He was of rather low intelligence, often abusive and aggressive when in drink, and a sore trial to his terrified wife. There was little of the malicious about him however, and the chairman of quarter sessions placed him on probation for twelve months. Like many men of his type, he was an industrious worker and no trouble under supervision. However he would be quite likely to commit a similar offence under provocation.

Violent cruelty to children

Few offences provoke more emotional reaction than violent cruelty to children. It is important to distinguish between these cases and those of neglect. In cruelty cases, the children are often well cared for prior to the offence, and are not neglected in any way. The figures for persons committed for trial at Quarter Sessions and Assizes from 1950 onwards are as follows [28]:

TABLE 4

Annual Average, 1950–54	1955	1956	1957	1958
35	26	27	20	25

Gibbens and Walker [29] studied the records of thirty-two men and seven women sentenced to a term of imprisonment for violence to children. The backgrounds of these parents are interesting, though, as the authors are the first to admit, it would be unwise to draw anything but tentative conclusions from their research. The majority of these parents were in the age group twenty to thirty. One was over fifty, and one under twenty. One-third of the cases under review had a history of mental abnormality *in the family*, and the *early* histories of these offenders seemed much more disturbed than those of the general delinquent population. Illegitimacy and parental separation rates were high. About a quarter of the offenders had a history of truancy, and a quarter had very poor work records, but, rather surprisingly, a further quarter had been in the services for long periods. Amongst these offenders there was a high percentage of physical or mental illness. In six cases, there had been a previous history of aggressive offences, ten had one to two previous convictions, and a further ten had three to ten previous convictions. The influence of alcohol was not so important as the authors had anticipated. Regarding environmental status, three were classed as "problem families," nine in pretty poor conditions, but seven were living in reasonably good social conditions.

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[28] Criminal Statistics, 1958. Cmnd. 803, H.M.S.O., 1959. (Earlier comparisons not possible due to regrouping of some offences.)

[29] *Op. cit.*

In summary, it seems that parents who exhibit violent cruelty to their children come from very disturbed backgrounds and seem to have some disorder of personality requiring treatment. However, as Gibbens and Walker point out, they are often just the people for whom treatment is not effective.

Malicious and Wilful Damage to Property

Though not strictly classed as crimes of violence there is often so large a component of aggression in malicious damage offences, or the act is so often a substitute for personal violence, that it has been thought expedient to consider such offences in this paper. R. R. Prewer in an excellent paper on *Window Smashing*[30] states that there are about 12,000 cases of malicious damage a year. Over 700 people were sent to prison for this offence in 1957. In a study of consecutive offenders received in prison for window smashing, Prewer found that their ages ranged from twenty to seventy-five, the average age was thirty-six years and nine months. Twenty-one were natives of Ireland, five were Scotsmen, two were Poles, one was Welsh and sixty-nine stated they were English. Sixty of these offenders stated that they *had no homes* (present writer's italics), thirty-three had been convicted of window smashing before and *sixty-five had been drinking* (present writer's italics). Few of these men appeared to be suffering from overt psychiatric disturbance, though there were one or two who were psychotic or mentally defective. Prewer distinguishes a number of causes of social interest for this particular offence. Accident; A prelude to stealing (*e.g.*, "smash and grab"); Revenge; To get in care—this seems most numerous; To seek attention—often associated with revenge; Despair. Other causes were felt to be frustration, excitement, primitive satisfaction or symbolism (*i.e.*, a substitute satisfaction for personal injury to some parent or other figure).

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[30] R. R. Prewer, "Some Observations on Window Smashing," *Brit.J.Delinq.* Vol. X, No. 2, 1959.

Regarding wilful damage in juvenile offenders, Martin[31] studied a group of 291 juveniles in the Bronx district of New York in 1955. He compared them with a group of "non-vandals," and found that the vandals were exclusively boys. Their mean age was 12·94 years, whereas the mean age of other offenders was 14·96 years. Half of both groups lived in the "lowest socio-economic levels." The boys were nearly always adolescent or pre-adolescent and these findings were offered in refutation of the frequent assertion that vandals are often in their late teens, and that such offences are prevalent in middle-class children. However, this study is by no means conclusive, and can only be applied to conditions in the U.S.A.

It has already been mentioned that wilful damage may be a substitute gratification for personal violence. The following case may emphasise the importance of understanding adequately the personal or family factors involved.

Case 10. Three boys of fourteen plus were charged with what amounted to an orgy of wilful damage to a number of railway carriages parked on a siding. They had systematically broken a large number of plate glass windows by hurling fire extinguishers through them, and then removed the electric light bulbs and thrown them around the railway track. It was estimated that several hundred pounds worth of damage had been caused. The history of each of these boys was revealing. The first lived with his grandparents, who though kindly were not particularly affectionate. His parents were separated and he hardly saw his mother. He was decidedly a boy with a "chip" on his shoulder. The second boy was illegitimate and came from a very disordered home background where his mother and elder sisters consorted with a variety of men at different times. He very clearly felt the odd one out. The third boy was a cousin of the second, and was spending a holiday with the family. He was the orphaned child of a distant relative, and spent most of his time in a large children's home. It is felt that these three boys met together by something more than mere chance, and that, unconsciously at least the particular offence they committed may have been a symbolic manifestation of their aggression towards their family situations.

Aggressive and Violent Offences Amongst Juveniles

Sir Cyril Burt has stated[32] that "any discussion of aggressiveness or violence in the young must take into consideration cultural factors (such as race and nationality, etc.), and it is well known that certain individuals are so constituted that variations in temperature and humidity can have a marked effect on their temperament." Burt also makes the important point that "in boys of ten or eleven criminal malice and mischief get directed more against property and less against persons. As adolescence draws near, however, personal violence becomes commoner once more. . . ." In general, the incidence of crimes of violence amongst juvenile offenders does not seem to be particularly high. In a study of 120 boys remanded for psychiatric examination by the London juvenile courts the present writer found the following disposition of violent or aggressive offences.[33]

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[31] J. M. Martin, "Some Characteristics of Vandals," *Journal of Criminal Law, Criminology and Police Science*, Vol. 50, No. 5, 1960.

[32] Sir Cyril Burt, *The Young Delinquent*, U.L.P., 4th ed., 1944.

TABLE 5

Robbery with violence	1
Sexual offences	2
Attempt to derail train	1
Blackmail	1
Grievous bodily harm	1

Donald Ford,[34] a magistrate of some experience, has stated " that most children are convicted of ordinary offences . . . and that much of the talk of the growing violence supposedly symptomatic of delinquent behaviour will not stand up when (the) . . . total figures . . . are reviewed. . . ."

Regarding violence in older adolescents, Norwood East and colleagues[35] found that in their study of adolescent criminals " there was no significant excess of any particular type of control . . . but there was a significant excess of resistive reaction to judicious, indulgent, or lax control. . . ."

The occasional crimes of violence committed by juveniles or adolescents appear to fit into the same pattern as those committed by older offenders. Two cases are cited:

Case 11. A youth of sixteen was charged with causing grievous bodily harm to his elderly employer. Apparently he had attacked him from behind, struck him violently over the head and stolen a sum of money which he had subsequently abandoned. Because of his previous good character and the apparent absence of any obvious abnormality he was remanded for psychiatric examination. He was found to be a youth who found it difficult to countenance any frustration and there was evidence that on the morning of the offence he had been " got at " by various people in authority over him, and his offence was partly seen as a result of poor tolerance of frustration. His mother, who was also interviewed, seemed to have a certain cold detachment about her, and she too was felt to have difficulties in dealing with frustration. The boy was subsequently committed to an approved school and his future considered favourable.

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[33] H. A. Prins, " Some Observations on Delinquent Boys and Their Families," *Case Conference*, Vol. VI, No. 6, 1959.

[34] Donald Ford, *The Deliquent Child and the Community*, Constable, 1957.

[35] Sir Norwood East and colleagues, *The Adolescent Criminal*, Churchill, 1942.

Case 12. A youth of sixteen was charged with attacking a young girl in a train. There was no provocation, and the young woman was unknown to him. He was a lethargic, rather slow-witted lad of unfortunate appearance with the result that he tended to be something of a "lone wolf." He had never been in any previous trouble, but a brother had appeared before the courts (not for violence). His mother when interviewed was found to be of rather poor intelligence with some neurotic traits. His father had died some years earlier as a result of committing suicide by inhaling ether, he seemed to have been addicted to this practice, and according to his wife, was peculiar in a number of other ways. An electro-encephalogram examination of the youth did not reveal any specific abnormality and it was felt that he needed careful watching for some time to rule out the possibility of further violent conduct. It was not altogether surprising to learn that he subsequently absconded from the approved school to which he had been committed and was apprehended for robbery with violence whilst on the run.

Violence Directed Towards the Self—Suicide and Attempted Suicide

The present writer makes some apology for including this category of offences since strictly speaking suicide is not classified as a crime of violence. It is merely included to round off our consideration of most forms of violent crime, and because violence towards the self may have similar roots to that of violence towards others. This is particularly true of the mother who murders her children and then tries to kill herself.[36]

The present writer would like to make it clear that, in company with a great many other people, he would favour the removal of the offence of attempted suicide from the Statute Book. Some figures relating to attempted suicide are given below[37]:

TABLE 6

Annual average				
		Quarter Sessions and Assizes		
1950–1954	1955	1956	1957	1958
5	6	8	7	5
		Magistrates' Courts		
611	607	596	680	528

The apparent drop in prosecutions in 1958 may be an indication of decreasing police activity in this kind of case. In all fairness to police authorities it must be stated that prosecutions are undertaken as a last resort in most cases. The following case is offered in illustration of this point.

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[36] For an interesting account of depressive illness and criminal conduct, see "Depression and Crime," G. M. Wodis, *Brit.J.Delinq.*, Vol. VIII, No. 2, 1957.

[37] Criminal Statistics, 1958. Cmnd. 803 H.M.S.O., 1959, pp. 9 and 11.

Case 13. A man of seventy-one was found to have attempted suicide by trying to hang himself from the bed-post. He had been in indifferent health for a considerable time and suffered from a severely disabling form of arthritis. Prior to the suicide attempt he had been acutely depressed. The police were called to the home and seeing that the defendant's wife was quite unable to care for him adequately decided to bring him before the court as a means of easing the family situation. The proceedings were adjourned for the defendant to be taken to the local mental hospital for examination. In three weeks he was fit enough to be taken before the court again and he was placed on probation with a condition that he undergo psychiatric treatment as an in-patient. However his condition deteriorated and he became increasingly senile and confused. His wife needed much support whilst he was in hospital, and this was provided by the probation officer as the children of the marriage lived a long way away.

Peter Sainsbury[38] surveying suicide in London found that suicide rates fall abruptly in times of war (perhaps other outlets for aggressive activity are available—see introductory comment to this paper) but increase in times of social and economic collapse (*e.g.*, in the 1930s). He found that the West End boroughs of London contributed 30 per cent. of the suicides, whereas the working class areas only 18 per cent. There was a tendency for suicide to occur more frequently in the boroughs with a high middle-class ratings and to diminish in those where poverty prevailed. Sainsbury also found that there was a significant relationship between suicide and social isolation and this is what one might expect. He also found that the single and the widowed were more likely to kill themselves than the married. Suicides seemed to be commonest in spring or early summer. Regarding method, he found that the most frequent means was coal-gas poisoning, poisoning, jumping and drowning, fire-arms, and hanging. Cutting was used by 23 per cent. of the males. Sainsbury felt that the prevalence of coal-gas poisoning was in part due to facilities available in an urban area. Regarding *early* home background, Batchelor and Napier[39] found that " the incidence of a history of broken home is higher amongst suicidal individuals than it is in any type of adult nervous or mental illness." It is important to remember the influence of cultural factors in any discussion of suicide; it is necessary to differentiate between suicide as an individualistic offence in the West, and as a ritualistic or symbolic offence in Eastern countries.

An interesting sociological study in suicide was carried out in

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[38] Peter Sainsbury, " Society and Suicide—Social Aspects of Suicide in London," *Howard Journal*, Vol. IX, No. 3, 1956.

[39] I. R. C. Batchelor and M. Napier, " Broken Homes and Attempted Suicide," *Brit.J.Delinq.*, Vol. IV, No. 2, 1953.

Michigan, U.S.A.[40] The authors found that there was a higher suicide rate amongst rural as opposed to town dwellers. They confirm previous studies that suicide is more prevalent amongst males than females (a ratio of 2 or 3 : 1) and that the rates increase with age. They found a higher rate amongst Protestants than Catholics, and in the area studied a lower rate amongst negroes than whites.

Although this was a limited study, it is of considerable interest in that it goes some way towards refuting the more common assumption that suicide is essentially an urban manifestation, and is associated with the pressures of urban life.

Conclusion

An attempt has been made to survey very briefly some of the social aspects of the more severe forms of violent and aggressive crime. Other offences not generally regarded as examples of violent crime have also been included in order to demonstrate comparative causes. In general, violent criminals do not seem to come from any highly characteristic social class, group, or family background. A violent offence may be associated with other criminal conduct in the offender's history. It appears that certain particularly dangerous classes of offender need special treatment or detention, but there is an inherent danger in dealing with *all* violent offenders as a special group. Although the specific offences they commit are worthy of special study they are best seen as symptoms of a wider disturbance and treatment should proceed with this last factor in mind.

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[40] Schroeder and Beegle, "Suicide: An Instance of High Rural Rates," in *Mental Health and Mental Disorder* (ed., A. M. Rose), Routledge and Kegan Paul, 1956.

The Racial Disturbances in Nottingham

By CAPTAIN ATHELSTAN POPKESS, C.B.E.

Background to the Riots

The racial disturbances in Nottingham are ancient history now—and long may they remain so. However, the problem of apartheid in the Union of South Africa inevitably makes us recall what happened in this country in 1958. The acts of violence which occurred in Nottingham and Notting Hill drew public attention to a situation which had for some time given cause for anxiety.

There had already been some violence, involving whites and coloureds in 1957, but the number of assaults which had then taken place involved injuries to white persons also. At that time, therefore, it did not appear that there was any " dead set " at coloured folk as such.

The district in which these disturbances took place in Nottingham had once been a good-class residential area, with well-built houses, but it had gradually deteriorated into a typical Midlands working-class district. The fact that there are now something over seventy public-houses within a square mile of the scene of the disturbances here described indicates the likelihood of a good deal of drunkenness, betting and prostitution.

This district, in the St. Ann's Well Road area of the city, was, inevitably, much overcrowded. Thus we had certain white elements complaining: " We've been on the Corporation's housing list for eight years. Now we have all these black people coming to Nottingham also wanting houses. What are our chances of getting fixed up in these circumstances—and my missus and kids have been living for long enough in three rooms in an old house we have to share with another family, and in which there are rats and cockroaches? And what's going to happen to the likes of me and my wife and kids should unemployment come back as it did in the 1930s, when I and blokes like me had to take the dole? Who asked these Jamaicans and whatnot to come to Nottingham, anyhow? "

By August 1958, some thousands of coloured people from the West Indies had taken up residence and employment in the city.

So far as those living in the quieter neighbourhoods were concerned, there was no trouble—outwardly expressed, at any rate. Such incidents were confined to the St. Ann's Well Road district.

For many years we in this small and overcrowded island have regarded with complacency, and often with contempt, outbreaks of violence which have flared up overseas. There has also always been a measure of local prejudice in some quarters against persons from other countries who have settled down in the United Kingdom, especially if they were of a different colour to ourselves. But up to the present this has not often resulted in acts of violence.

In the main there is at present sufficient work in and around the city for unskilled labour to absorb the majority of these coloured immigrants. Unfortunately, as in all communities, there were the minority who did not want work but preferred to live on the bounty of those whites who did—and this was a burning source of resentment. At the end of the week one could see many of them down at the Labour Exchange drawing the dole, when there appeared to be plenty of work available—employers were crying out for labour of all kinds.

West Indians, as such, are not particularly astute business men. The Indians and Pakistanis, however, who have also settled in the St. Ann's Well Road area, certainly are. And they were not slow in acquiring old properties locally, putting them in some sort of temporary repair, and then letting them out in rooms at exorbitant rentals. One such Pakistani landlord, for instance, who was known to have come to this country penniless after the war, contrived to buy up no fewer than fifty such old residences, and to be making much money out of them.

Much of this property should have been demolished on the score of public health long since. But the Local Authority had not included it in any slum clearance scheme, because of their obligation by law to provide alternative accommodation for the persons displaced, which could only be done to the detriment of white citizens, many of whom had been waiting patiently to enjoy better living conditions for a very long time.

The great majority of the West Indians, most people agreed, were well behaved; but there was a small minority of coloured men—recognisable by their flashy clothes and insolent manners—who were not. Unfortunately there were sufficient of these individuals to damage the reputation of the remainder.

It was some of these coloured "wide boys" who carried knives as weapons of offence. And it became known to the police, and doubtless to many members of the public, that some of them had begun to organise prostitution in the district. A number of such women of the street had been brought from Birmingham and Manchester. Prostitution in this new form, organised and obtrusive, was regarded in the district as an outrage. Moreover, the increasing noise made by parties of coloured men—at which no fewer than eighty or ninety of them sang and danced all night—was a further source of local friction.

During the last two or three years, Nottingham, like so many other large centres of population, began to suffer from the hooliganism of youths of the " teddy boy " type. Lads of sixteen to eighteen years of age began to frequent street corners in gangs, and it wasn't long before they started to turn their attention to threatening and assaulting coloured folk.

The Riots

Thus we arrive at what occurred on August 23, 1958. When, as a result of a " 999 " telephone call at 10.21 p.m., from the licensee of the Chase Tavern, in St. Ann's Well Road, to say that there were coloured people and whites fighting outside his premises, two police patrol vehicles were sent to investigate, and the foot division of the area was informed by the information room at police headquarters.

At 10.25 p.m. a request was received from one of these patrol vehicles by wireless to send an ambulance immediately. At the same time that this incident was reported in St. Ann's Well Road, there was another disturbance with coloured men in Wilford Grove which was being dealt with by other officers.

Five white people were found to have been injured in the disturbance in St. Ann's Well Road—four of them by stabbing, and one by a kick in the stomach. They were taken to hospital at once. They had all been drinking in public-houses. By the time the police arrived on the scene the assailants had disappeared into the darkness of adjacent streets, many of which were inadequately lit. Meanwhile, two more whites had been stabbed by coloured men—this time some two hundred yards from the scene of the original fracas.

The news of these events soon spread, and at 11 p.m. about 1,500 people had gathered between Peas Hill Road and Robin Hood Chase. At 11 p.m. the events in St. Ann's Well Road were assuming such serious proportions that more officers were immediately sent to the scene. Because the crowd, now in an ugly mood, refused to move on a request was received to send a fire engine to help disperse it.

All available officers in the city were contacted, and the Assistant Chief Constable, together with the Superintendent of the

Southern Division, arrived at the scene at 11.10 p.m., by which time the fire engine had also arrived.

The mob were now attacking any coloured person on sight, whether they had been implicated in any way in the disturbance or not. Only the presence of the police prevented them being severely handled, if nothing worse. Indeed, the mob had worked itself up into such an ugly mood that anything might have happened.

The situation was now such that the fire brigade personnel were requested to lay out their lines and put them in readiness for immediate use. On witnessing these preparations and anticipating a good dousing, the mob began to disperse using much bad language.

There is little doubt that by this prompt action a still more serious situation was averted. It should be emphasised that it was the intention of the police to man the hoses themselves and not fire brigade personnel—although my impression is that they would have been only too happy to oblige!

Instructions were now given to all police officers present to clear the streets and by midnight the whole area had returned to normal. A few patrols remained, however, in case of any further outbreak.

It had been necessary during these events to remove several coloured folk to police headquarters for their own safety—a fact that some of them were not slow to resent. But they were allowed to leave again at 12.35 a.m., when it was safe for them to do so.

As a matter of interest, a few days after being stabbed, two of the victims received literature from the Ku-Klux-Klan "British Headquarters."

So much for the events of August 23. On August 29 disturbances started in the St. Ann's Well Road district again. Press publicity, remarkable more for its sensation than its verity, and some of it quite irresponsible, attracted large numbers of sightseers into the area—including many unruly youths. As the public-houses were closing the crowd included many drunks.

Despite these difficulties the police were able to get the crowd moving; serious trouble then started as the result of a camera man letting off a powerful magnesium flare to secure a film story. Whether the "skirmish" he sought to film was genuine one has some doubt. But the flare was of such brilliance as to excite the crowd into believing that there was a serious fire at that spot, and large numbers rushed back to see what it was all about.

The crowd had now become an unruly mob and began fighting with the police. Twenty-three arrests were made for offences under section 5 of the Public Order Act, 1936.

Anticipating that there might be a recrudescence of rioting, the police had taken special precautions, including the setting up of an operations centre in touch with the information room at police headquarters by wireless. This proved to have been a wise precaution, as the mob they now had to deal with was not only large but ugly—especially after so many arrests had had to be made.

" It's the bloody niggers we're after—let's get at them! " was being shouted on all sides. But the Jamaicans and other coloured men were not to be seen.

Police difficulties were now much magnified by the fact that hundreds of sightseers flocked into the area by car " to see the fun," and it even became necessary for the police to put up traffic diversions to keep them at a safe distance.

The worst of the trouble had started at 10.40 p.m., but it was well in hand by 11.20 p.m. And by midnight all was quiet again. How swiftly public disorder can rise to fever heat and then cool down again!

Of the white rioters arrested, all were brought before the court on September 1. Five were sentenced to imprisonment; the cases against three were dismissed for lack of evidence and the remainder were heavily fined.

In passing sentence the magistrate commented: " I want to say a word about the police. One cannot imagine a more difficult task, or a more obnoxious one than that which they had to do. But they did their work with efficiency, and they deserve to be commended by all right thinking citizens."

The coloured men who were charged with the stabbing, etc., were dealt with at assizes on November 19, when Mr. Justice Elwes said: " As the result of prompt and efficient police work, and the normal process of the law, justice swift, certain and sure as required has overtaken those responsible."

Undoubtedly much of this trouble resulted from the fact that the method of retaliation employed by the Jamaicans on the night of August 23, *i.e.*, the use of knives, is so alien to this country, and therefore greatly resented by the local white residents. And what happened on the night of August 30, when there were no coloured persons abroad in the streets, could best be described as hooliganism on the part of the rougher elements of the district.

Crimes of Violence and the Sentencing Policy of the Courts

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It is essential in a study of this kind to be clear what precisely is meant by a crime of violence. In recent discussions in the newspapers on the reintroduction of corporal punishment for such offences, it has been emphasised that the crimes of violence, to which this punishment was attached before 1948, were predominantly certain forms of robbery.[1] These were armed robbery, robbing in the company of one or more persons and robbery with personal violence (Larceny Act, 1916, s. 23). It is true that corporal punishment could be imposed under the Larceny Act, 1861, s. 21, which related to males attempting to strangle; thus rape or some attempts to cause bodily harm accompanied by attempts to strangle came within this provision.

As far as indictable offences are concerned the Annual Statistics relating to Crime and Criminal Proceedings classify crimes into six groups: offences against the person, against property with violence, against property without violence, malicious injuries to property, forgery and offences against the coinage, and, lastly, other offences, such as those against the state and public order, perjury, libel and suicide.[2]

The two groups of crimes relevant to this discussion are offences against the person and offences against property with violence. As regards the former, the *Criminal Statistics* list sixteen out of the twenty-nine offences comprised in this group as offences of violence against the person.[3] These range from homicide, wounding with intent, malicious wounding and assault, to cruelty to children, procuring an abortion and concealment of birth. The violent sexual offences are not included, such as rape and indecent assault on women. As regards offences against property with violence, these include burglary, housebreaking, shopbreaking and robbery.

Of the non-indictable offences, the three forms of assault

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[1] See *Report of the Departmental Committee on Corporal Punishment*, 1938, Cmd. 5684.

[2] See, *e.g.*, *Criminal Statistics*, 1958, Cmnd. 803. App. VI, pp. liii–lvi.

[3] *Criminal Statistics*, 1958, Cmnd. 803, p. xviii, where a Table showing the number of persons found guilty of the different offences in the years 1938, 1956, 1957 and 1958, together with the percentage variations in 1958 as compared with 1957, are set out.

(aggravated, on a constable and common assault) are the ones essentially falling within the description of crimes of violence, omitting such offences as cruelty to animals or children. Carrying an offensive weapon [4] would seem to be an important indication of violence; but action will not be taken for this offence until something has happened which will bring the weapon within that description. Moreover, the figures for such offences are not available since the *Criminal Statistics* include them generally under the Prevention of Crimes Acts. Furthermore, the difficulties encountered in obtaining a conviction under this Act are considerable [5]; thus any value that might have been attached to the numbers of such an offence is minimised.

It is apparent therefore that, for a consideration of crimes of violence and sentencing by the courts, some more precise meaning must be given to the phrase. Assaults and robbery would seem to be the generally accepted meaning, excluding the motoring offences, such as causing death by dangerous driving, and the sexual offences. Here again further difficulties present themselves if trends in crime are being considered. For, even though the statistics should show an increase in indictable assaults, it has to be recollected that there are a large number of non-indictable ones and it is well known how blurred a line distinguishes the two in many cases. Again, as regards robbery, recent cases have made quite apparent the chance which pushes this crime, and indeed larceny also, into the homicide category.[6]

The statistics

The following Table shows all indictable offences of violence against the person [7] contrasted with the number of persons found guilty in the same year of indictable offences of any kind by the higher courts and the magistrates' courts.

	Offences of violence to the person	All indictable offences in higher courts	All indictable offences in magistrates' courts
1938	1,583	8,612	69,851
1956	5,979	17,695	98,179
1957	7,079	20,698	110,222
1958	7,895	25,246 [8]	121,468 [9]

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[4] Prevention of Crimes Act, 1953.

[5] See, *e.g.*, *Farrell* v. *Rennicks* [1960] Crim.L.R. 113.

[6] See, *e.g.*, *R.* v. *Chrimes* [1959] Crim.L.R. 780, C.C.A., *R.* v. *Di Duca* [1959] Crim.L.R. 782, C.C.A., *R.* v. *Jones* [1959] 1 All E.R. 411, C.C.A.

[7] Giving this phrase the meaning accorded to it in the *Criminal Statistics*, 1958, p. xviii.

For notes 8 and 9 see next page.

The steady increase in offences of violence to the person can be accounted for by the considerable rise in the number of assaults, particularly malicious wounding, followed less closely by wounding with intent and assault. It must be remembered that non-indictable assaults are not included in these figures. Causing death by dangerous driving has increased considerably; but the number of offences is small in comparison with the assault group.

Dividing the violent offences against the person into given age groups (8–14; 14–17; 17–21; 21–30; 30 and over), the figures show an increase in each age group in 1938, whereas in 1956, 1957 and 1958, the figures reach their maximum with the age group 21–30 and thereafter drop.

In contrast with offences of violence against the person is the offence of robbery. Here, the figures representing those found guilty also show an increase throughout the years:

1938	127			
1956	496	including	16	females
1957	636	,,	18	,,
1958	882	,,	35	,,

These figures include a small but increasing number of such offences by persons under seventeen years of age. Amongst the five age groups in 1938, 1956 and 1957, the 21–30 took first place followed by the 17–21 group. In 1958, these positions are reversed, the 17–21 group taking first place. The other point to be noticed is that in 1956 there is a drop in numbers amongst the 14–17 group, which roughly ties for place with the over 30 group, to fall below the 8–14. The same drop occurs in 1958,[10] but not in 1957.

Among the non-indictable offences, for which there was a finding of guilt, assaults are the most important offences of violence to the person. The number of assaults has remained fairly constant throughout the years:

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[8] The chief single offences comprised in this figure of 25,246 are breaking and entering (15,495) including shopbreaking (9,235) and housebreaking (2,829). The group of larcenies comprise 1,900 offences. For the purposes of the *Criminal Statistics*, breaking and entering offences include all offences against property with violence except robbery and blackmail, *e.g.*, sacrilege, house and shopbreaking, etc. Likewise, the larceny group includes embezzlement, simple and minor larcenies, etc.; but not obtaining by false pretences or frauds. See *Criminal Statistics*, 1958, pp. v, para. 2, xv and xvi.

[9] This figure includes breaking and entering (13,339) and the larceny group (86,066). For the offences these terms comprise see note 8.

[10] Compare the relative positions of the age groups in respect of all indictable offences in 1958 when the 8–14 group exceed in number the 14–17 as the most criminal age group.

	Non-indictable assaults	Findings of guilt for all non-indictable offences [11]
1938	10,699	233,895
1956	10,317	215,810
1957	10,999 (including 1,651 females)	235,976
1958	11,043 (including 1,527 females)	249,955

It is well known that criminal statistics of persons convicted are merely a rough indication of trends in general and particular criminality. There obviously must be variations in the assiduity with which the police charge for particular crimes.[12] Again, the offences with which the police charge may vary, for example, in relation to assault. As Barbara Wootton puts it: "That we should reject the official criminal statistics as evidence of criminal trends is a hard doctrine, because it means that we must be content to confess ourselves quite ignorant as to whether our population is becoming more, or less, addicted to crime. . . . The most that can be said is that the figures show two or three features which are so marked and so persistent as to give reasonable grounds for regarding them as likely indications of the relative frequency of different kinds of crime and different types of criminals." [13]

Trends in punishment

(i) *Assaults.* The result of proceedings in 1958 in respect of felonious and malicious wounding shows a preference in the higher courts for imprisonment. This is followed at a considerable distance by probation and Borstal training, in the case of felonious wounding, and by a fine or probation, in the case of malicious wounding. The majority of the terms of imprisonment in respect of felonious wounding were 1–2 years; with lesser frequency sentences of six months to one year and 2–3 years were imposed. In respect of malicious wounding, the most common term was six months to one year, followed in frequency by sentences for 1–2 years and then for under six months. In respect of assaults, a fine, followed at some distance by imprisonment and then by conditional discharge, is the preferred sentence of the higher courts.

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[11] Omitting the huge number of traffic offences which amounted, in the respective years, to: 1938: 475,124; 1956: 452,346; 1957: 497,294; 1958: 596,587.

Traffic offences include motor offences, such as reckless and dangerous driving, as well as obstruction, nuisance, offences with pedal-cycles, etc., and taking motors without consent. See *Criminal Statistics*, 1958, p. ix.

[12] See, *e.g.*, *Criminal Statistics*, 1958, App. III (b), p. xlix—the table showing the number of police cautions.

[13] *Social Science and Social Pathology* (1959), p. 25.

In contrast, these same offences tried summarily, that is for the most part malicious wounding and assault,[14] are visited most commonly by a fine for adult offenders, followed at a long distance by imprisonment and then by conditional discharge or probation. However, in the case of those 14–17, probation and then conditional discharge or an approved school order is used for felonious wounding, and a fine, followed at some distance by conditional discharge or probation, for malicious wounding. For those 8–14, a conditional discharge is the most usual order on a finding of guilt for malicious wounding, followed by a fine or probation. The numbers of offences in this age group of felonious wounding or assault are negligible.

(ii) *Robbery*. In the higher courts the punishment for robbery is most commonly imprisonment. This choice of sentence in 1958 is following at some distance by Borstal training and then by probation. The length of the sentence of imprisonment is usually from 1–2 years, followed with much less frequency with sentences of 2–3 years or six months to one year. It is not infrequent however for sentences of 4–7 years to be given ; but it is exceptional for heavier ones to be imposed.

In the magistrates' courts in 1958, for those 14–17, probation is the most frequent sentence followed by approved school orders. Those under fourteen are usually put on probation or conditionally discharged, though a lesser number are sent to an approved school.

The policy of the courts

In reaching these conclusions on trends in punishment some help may be given by reference to the cases, and in particular to decisions and observations of the Court of Criminal Appeal, to show the judicial policy in sentencing.

Except where the punishment is fixed by law, as in high treason and capital murder, sentencing is a matter of judicial discretion, subject to maximal limitations. This discretion should, in the absence of mental disease of some kind, be exercised by the court and not left to other authorities. This was an observation made on a sentence of imprisonment for life for manslaughter, leaving it for " other authorities " to determine when the offender should be allowed to mix with his fellow human beings. The

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[14] Felonious wounding is tried by the higher courts unless the offender is under seventeen years of age.

Court of Criminal Appeal substituted a sentence of five years imprisonment.[15]

Indication of the sentencing policy of the court in respect of all kinds of offences may be drawn from cases, particularly those in the Court of Criminal Appeal. For instance, heavy fines are appropriate only when the object of the prosecution is largely to prevent the offender from obtaining financial benefit for his breach of the law.[16] Again, the primary concern of the court is the protection of the public and thereafter deterrence of others. If rehabilitation of the particular offender is thereby achieved, so much the better; but this latter purpose is ancillary in the exercise of the discretionary sentencing power.[17] For example, a man, who was apparently a psychopath with uncontrollable impulses, was sentenced, for assault with intent to ravish and for possessing an offensive weapon, to two consecutive terms of imprisonment of two years each. It was essential in the appellant's own interest and for the protection of the public that such a sentence should be given.[18] This policy would hold for the juvenile court as well; but here there is unlikely to be as long a series of offences to consider as in the case of adults. This, together with the assumption that youth is more malleable, enables the juvenile courts to place more emphasis on the reformation of the offender than the higher courts. There is no doubt, however, that the court does consider that a period of going straight, even with a bad record, followed by an offence indicates a sentence of less severity. Such is evidenced by decisions of the Court of Criminal Appeal, for example, in *R.* v. *Shotton*,[19] where going straight for two years after a serious record, followed by an offence of a trivial nature (breaking and entering) resulted in eight years preventive detention being reduced to nine months imprisonment. Also, in *R.* v. *Evans*,[20] where a bad record was followed by conduct which indicated that the offender had responded to probation, a sentence of five years' imprisonment was substituted for eight years preventive detention.

That the background of the offender plays a large part in the sentencing policy of the court is apparent. For example, in *R.* v. *Weaver*[21] a girl of nineteen, who came of good family but had married a man belonging to a family notorious for crime, was convicted of false pretences and larceny. She had committed nine similar offences since November 1958. On appeal the sentence of borstal training was changed to three years probation, partly on the basis of the Prison Commissioners Report, since institutional training was not in her best interests. Likewise, leniency was shown in the case of a girl of nineteen, whom the Lord Chief Justice described as a nuisance but who did not as yet seem to be criminally minded.[22] When there is a good background the court may impose a sentence that is intended purely as a deterrent to others, even in the case of a serious offence, for example, in so-called mercy killing.[23]

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[15] *R.* v. *O'Connor* [1960] Crim.L.R. 275, C.C.A.

[16] *R.* v. *Markwick* (1953) 37 Cr.App.R. 125.

[17] *R.* v. *Ball* (1951) 35 Cr.App.R. 164; *R.* v. *Van-Velsen and Others*, *The Times*, November 12, 1959, *per* Hilbery J. at the Central Criminal Court; *R.* v. *Kent* [1959] Crim.L.R. 468.

[18] *R.* v. *Cowburn* [1959] Crim.L.R. 590, C.C.A. It was in this case that the court refused to give its blessing to an operation for castration on the accused.

[19] *The Times*, January 15, 1960, C.C.A.

[20] *The Times*, May 20, 1958, C.C.A.

[21] *The Times*, June 23, 1959, C.C.A.

There is little evidence to show whether an offender, with a history of crimes against property, is unlikely to resort to crimes of violence against the person. This would require a careful study of prisoners' records. The impression is gathered however from reading the cases that many of those who commit offences against property do not get involved as a rule in personal violence, except in resisting arrest or detention.[24]

However, in offences of violence to the person, the court has shown a much sterner attitude in its pronouncements, particularly in recent years when public concern in the so-called increase of violence has undoubtedly increased. Perhaps the beginning of this trend was the Notting Hill colour disturbances in August/September 1958, when nine youths of otherwise good character, aged between seventeen and twenty, were each sentenced to four years' imprisonment for wounding with intent and assault.[25] This sentence was confirmed on appeal. The learned judge made it clear, when passing this sentence, that the severity was intended as a general deterrent: "As it is, I am determined that you and anyone anywhere who may be tempted to follow your example shall clearly understand that crime such as this will not be tolerated in this country, but will inevitably meet in these courts with the stern punishment which they so justly deserve."

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[22] *R.* v. *Hodkinson*, *The Times*, February 17, 1959, C.C.A., for a case of larceny. See also *R.* v. *Cozens and Sawkins* [1959] Crim.L.R. 376, C.C.A., where two youths of eighteen and nineteen were convicted of stackfiring. A borstal training was varied to three months in a detention centre, the boys being of otherwise good character and good workers who showed no criminal tendencies. The offences, it was observed, seemed a senseless bit of mischief and deserved punishment.

[23] *R.* v. *Moodie* [1959] Crim.L.R. 372, C.C.A.

[24] As, *e.g.*, in *R.* v. *Kent* (above) and *R.* v. *Wilsher* (1953) 37 Cr.App.R. 110. Recent murder prosecutions have been occasioned by surprise in the course of theft: *R.* v. *Di Duca* [1959] Crim.L.R. 782, C.C.A., and *R.* v. *Chrimes* [1959] Crim.L.R. 780, C.C.A.—both capital murder—and *R.* v. *Jones* [1959] 1 All E.R. 411, C.C.A.—not capital murder.

[25] *R.* v. *Woodrow and Others* (1959) 43 Cr.App.R. 105, for the judgment of Salmon J. given at the Old Bailey, see *The Times*, September 16, 1958.

This was a case of violence which could occur in any part of the country. There are cases, however, where the court takes into consideration the prevalence in the locality of the crime, particularly if it is one of violence. Such cases were *R.* v. *Tuppin* and *R.* v. *Taylor*[26] where both accused, aged nineteen and of otherwise good characters, were convicted of causing grievous bodily harm. The Lord Chief Justice, after dismissing the appeal of Tuppin against sentence of two years' imprisonment and substituting for that term eighteen months for Taylor, observed that this type of crime was very prevalent in Southampton and had been for some time; he thought it necessary to take some drastic steps to stop it.

Crimes of violence to the person are closely related to the different forms of assault. An assault with intent to commit a felony may bear a close resemblance to attempted rape[27]; the line that divides unlawful wounding and wounding with intent to do grievous bodily harm may be very shadowy[28]; a common assault may even be effected through the activities of a dog protecting its master and reacting to a supposed threat to the master.[29] The nature of the violence will inevitably affect the sentence which, in *R.* v. *Hillan*,[27] involving a sexual offence, was two years imprisonment, and in *Plunkett* v. *Matchell*[29] was an absolute discharge. This is well illustrated by *R.* v. *Payne*,[30] where a sentence of five years' imprisonment was reduced to twelve months, the accused having been convicted of assaulting his wife, causing her actual bodily harm. He was thirty-eight years of age and had many previous convictions for larceny and similar offences, but not for violence; moreover, he had not been in trouble since 1954. Having regard to these circumstances and the fact that the accused was charged with assault occasioning actual bodily harm, and not with an attempt to strangle or wound with intent, or causing grievous bodily harm, this did not seem to the court to be a case for the maximum penalty. An indecent assault on the other hand by a youth of nineteen, of otherwise good character, was regarded by the Court of Criminal Appeal as one not needing discipline, since the accused was honest, but punishment for outrageous conduct. Therefore imprisonment for twelve months, not borstal training, was the sentence.[31]

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[26] *The Times*, April 3, 1958, C.C.A.

[27] See, *e.g.*, *R.* v. *Hillan* [1958] Crim.L.R. 45, C.C.A.

[28] See, *e.g.*, *R.* v. *Ibrahim and Others* [1958] Crim.L.R. 130, C.C.A.

[29] *Plunkett* v. *Matchell* [1958] Crim.L.R. 152, S.W. Magistrates' Court.

[30] [1958] Crim.L.R. 483, C.C.A.

[31] *R.* v. *Bull* (1957) 41 Cr.App.R. 133.

There does not seem any doubt however that wounding with a knife, or some implement clearly designed to inflict injury, will be visited with severe punishment, unless there are unusual circumstances and the injury inflicted is not permanent. On this point, compare the capital murder of a police constable, during a disturbance outside a dance hall,[32] with seven years imprisonment, reduced to four years by the Court of Criminal Appeal, for the wounding of a girl, so as to disfigure her, by a Sikh aged twenty-three in fulfilment of an oath.[33] This latter was described as a perfectly deliberate act and a horrible crime but nevertheless there were mitigating circumstances. Where there was mental disturbance, three years imprisonment was altered to three years probation, with a condition of treatment for twelve months, for wounding with intent by a man of thirty-one. The offender, who had had mental trouble from an early age and was of previous good character, had attacked his fiancée when she broke off their engagement.[34]

When the assault is not carried out with an implement clearly designed to inflict injury but is in fact in the nature of an unpremeditated skirmish, then the court is more lenient. For example, a man of thirty-one of previous good character, who, together with others, set upon a taxi-driver, was sentenced to twelve months and two years imprisonment to run concurrently for assaulting a police officer. The ringleader of the group was given three years.[35] In contrast with this case is an assault committed with others on a police officer outside a public-house. The appellant was eighteen years of age. The Court of Criminal Appeal stated that the offence was serious, involving kicking and punching in the face; but the appellant had no previous convictions and came from a respectable family. Moreover, he had been in regular employment and the offence undoubtedly was due to his association with undesirable persons. The sentence of borstal training was not in the circumstances considered appropriate; what was required was a short sharp punishment. Accordingly a detention centre order was substituted.[36]

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[32] *R.* v. *Marwood* [1959] Crim.L.R. 784, C.C.A.

[33] *R.* v. *Gill* [1960] Crim.L.R. 440, C.C.A.

[34] *R.* v. *Cleverley* [1960] Crim.L.R. 374, C.C.A.

[35] *R.* v. *Dorrian* [1958] Crim.L.R. 822, C.C.A.

[36] *R.* v. *Cooper* [1959] Crim.L.R. 301, C.C.A. To similar effect, see *R.* v. *McGeady* [1959] Crim.L.R. 598, C.C.A., where the appellant was sixteen years of age and pleaded guilty to two offences of causing grievous bodily harm with intent.

Conclusions

In the words of Barbara Wootton: " Violent crime looms large in the press; but whether or no it is (as is widely believed) becoming more frequent, it is still happily rare." [37]

Some publicity has recently been given to the slashing and breaking up of railway carriages by young (working-class) hooligans. The London and Home Counties Branch of the Cinematograph Exhibitors' Association has asked the London County Council to make a bye-law imposing penalties for hooliganism in cinemas and other places of entertainment.[38] These are only two recent examples of violence which have disturbed the public through the press. Such events call to mind A. K. Cohen's statement: " The motivation to working-class delinquency, . . . is in the area of ego-involved status differences in a status system defined by the norms of respectable middle-class society. The delinquent sub-culture of the working-class boy has the primary functions of (i) establishing a set of status criteria in terms of which the boy may more easily succeed; (ii) enabling him to retaliate against the norms at whose impact his ego has suffered, by defining merit in terms of the opposite of those norms and by sanctioning aggression against them and those who exemplify and apply them. The fact that this behaviour is symbolic of masculinity heightens the appeal of this response, because it is consistent with his conception of himself as a male and because there are few other areas of distinctively masculine achievement open to him which are also instrumental to the solution of his status problems. It also helps to explain why girls do not resort to this kind of behaviour." [39]

If some form of reparation for the victim is to be considered, the problem in respect of crimes of violence to the person is complicated. There are provisions in force today; but insufficient use is made of these facilities as far as damage to property is concerned. However, the question of compensation for assault could be considered on an order for probation or a conditional or absolute discharge being made.[40] If some compensation scheme were evolved, for example, a scheme grafted on to industrial insurance, compensation for assault would be extensive. Should it cover family rows? Moreover, compensation for a sexual offence or a mental injury is extremely difficult to assess.

The statistics shows some of the facts; but the reasons for the trends and the resulting methods of combating them are left unresolved. Literary works, such as Richard Church's *Over the Bridge*, and Mayhew's *London Labour and London Poor*, indicate that fifty or a hundred years ago law enforcement was far more uncertain, at least among the working class, than in recent years. The police today are omnipresent and, indeed the methods of following-up such incidents as violent assaults, through hospital cases, for example, are much more effective. A socio-historical study of police enforcement respecting crimes of violence to the person, if such were possible, might well result in evidence that the increase is not so great. What certainly is serious, however, is the fact that the violence today appears to be perpetrated outside the area or group of the offender and against persons unacquainted with the culture which give rise to it.

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[37] Above, p. 28. The violence of the reckless motorist is excluded when making this statement.

[38] *The Times*, June 22, 1960.

[39] Albert K. Cohen, *Delinquent Boys*, Kegan Paul, 1956.

[40] Criminal Justice Act, 1948, s. 11 (2).

The Treatment of Violent Criminals [*]

By GORDON HAWKINS, B.A.

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Dimensions of the Problem

In a sense all crimes are violent and all criminals are violent criminals. They do violence to our persons or our property, to our principles or our sense of propriety, or perhaps merely to the peace and public order. At the same time it is customary to regard certain offences involving the exercise of physical force, or the exhibition of physical force in order to intimidate, as belonging to a special category of crimes of violence. And a man or woman who commits such an offence is sometimes said to be a violent criminal. It is important to recognise that this classification is quite arbitrary however, and is not based on any rational principle. For the truth of the matter it that there is an element of aggressiveness in most criminal acts and it is not necessarily at its greatest in those crimes classified as crimes of violence. Thus the Baroness Wootton [1] in her Clarke Hall Lecture remarked that: " Robbery with violence . . . normally suggests gross thuggery; but I have known more than one case so classified that was really very little more than a schoolboy fight." On the other hand C. H. Rolph [2] wrote recently of " bigamy cases . . . scarcely distinguishable from rape." It is hardly necessary to multiply examples.

This does not mean of course that it is not possible to make any meaningful or valid statements about crimes of violence in the sense indicated above. It is possible for example to point out that such crimes represent only a very small proportion of the total amount of crime committed every year. Thus the total number of persons found guilty in 1959 of offences of all kinds was 1,040,796; but of these only 9,148, or 0·9 per cent. of the total, were found guilty of violence against the person. And even if we confine ourselves to indictable offences only it is worth remembering that larceny, breaking and entering and receiving alone accounted for 83 per cent. of the persons found guilty of indictable offences last year. It is important to preserve a sense of proportion in regard to quality as well as quantity, and here we may recall the Lord Chancellor's [3] statement in the House of Lords last year that "crimes of violence consist largely of offences arising out of brawls or family disputes resulting in relatively minor injury very often inflicted with fists." Such statements are informative and enlightening if somewhat jejune. Yet experience shows that those who venture beyond these careful limits fall into great danger of talking nonsense. Thus it is not at all uncommon for people to talk about violent criminals as though they constitute a specially dangerous group readily distinguishable from the rest of offenders; and moreover a homogeneous group about which those with special experience or insight can reasonably be expected to formulate useful generalisations. Certainly when one considers the question of the punishment or treatment of those who commit violent crimes there is no shortage of recipes confidently recommended as being uniquely effective for dealing with them.

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[*] I am grateful to the Prison Commissioners for permission to publish this article but permission does not imply that it represents their views.

[1] Barbara Wootton, " Contemporary Trends in Crime and its Treatment." The Nineteenth Clarke Hall Lecture, 1959.

[2] C. H. Rolph, " The Problem for the Police," *New Statesman*, June 25, 1960.

An interesting recent example of this is the Hon. Mr. Justice Salmon's [4] article on "Crimes of Violence" in the *Cambridge Law Journal*. In that article Mr. Justice Salmon remarks on the fact that "there is undoubtedly a very considerable popular clamour" in favour of a particular type of punishment or treatment for those who have committed such crimes, and he adds that this clamour is supported by "a number of most distinguished, learned, experienced and wise men." Mr. Justice Salmon is convinced however that this popular demand is mistaken. "The two main objects of all punishment," he states, "are (a) to reform the criminal and (b) to deter criminals and potential criminals from crime"; and he maintains that the particular mode of treatment recommended fulfils neither of these two main objects. Indeed as far as the first is concerned he says "the evidence shows the contrary." He then proceeds to recommend a quite different form of punishment or treatment on the grounds that it is "the real deterrent" and that "nothing is more effective." It is not without significance however that he ignores the question whether his own favoured method is any more efficacious than that which he rejects in relation to the first object of punishment, *i.e.*, the reform of the criminal. For, of course, in regard to that primary object there is as a matter of fact no evidence that his proposal would be any more effective than that supported by popular clamour.

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[3] The Rt. Hon. Viscount Kilmuir, House of Lords Debate, April 8, 1959, *Hansard*, cols. 448–449.

[4] The Hon Mr. Justice Salmon, "Crime of Violence," *Cambridge Law Journal* (1960), pp. 45–50.

It will be noticed that in citing this example I have omitted any mention of the nature of the alternative types of punishment recommended. The omission is deliberate for what needs to be said in this connection can be said without reference to any specific mode of treatment. For the simple yet apparently unpalatable truth is that our ignorance is equally abysmal in regard to them all. Indeed the amount of experimental work done on the effects of punishment on offenders of any kind is negligible. Furthermore, such evidence as there is seems to suggest that nearly all kinds of treatment have very much the same result when one compares them. It is scarcely surprising therefore that most arguments about the subject should be nugatory and fruitless. In these circumstances no amount of distinction, learning, experience or wisdom on the part of the protagonists can make up for the lack of empirically verified facts on which to base judgment.

It seems reasonable however to ask why there should be so much discussion and debate and so many assured yet contradictory pronouncements on this subject. A full answer to this question would take me far beyond my terms of reference, but perhaps a few words would not be out of place. It is true that the punishment of violent criminals is a subject which has always excited popular interest; but clearly the feeling that special attention ought to be paid to them—that special measures may be necessary to deal with them—at this time is due in part to the belief that in recent years there has been an enormous increase in crimes of violence. On television and radio, in newspapers and magazines it is constantly being suggested that we are faced with an unprecedented wave of crime which threatens to engulf us. And here the appearance of that elusive and evanescent phenomenon, so much beloved of journalists, the " wave of crime " should put us instantly on our guard. Let us put aside the question—and the Lord Chancellor's statement cited above is relevant to this—of the quality of the " wave " and consider merely the quantitative aspects of the matter.

Two points need to be made in this connection. In the first place, if we take the long view it is not at all clear that in relation to the considerable increase in population over the past half-century there has been, in that period, any significant increase in crimes of violence; and, indeed, the reverse might very well be true. Moreover if there has been an increase it would, in view of the nature of our criminal statistics, require a great deal of special research to determine its extent.

Secondly, if we confine our attention to recent years we have to bear in mind the familiar problem regarding differences in recording indictable offences known to the police, not only between different police forces but also between the same police force at one time and another. It is only a few years since the crime figures in a particular northern town rose by almost 50 per cent. as the result of a new system of reporting and recording incidents. The Home Office Statistical Advisor's warning is pertinent here. "In 1952," Mr. Lodge [5] points out, "the number of convictions of indictable woundings and assaults exceeded by one thousand the number for 1948, while the number of convictions of non-indictable assaults was less by two thousand: the explanation *may be that the tendency to commit serious offences is increasing* while disorder in general is declining, *but it is alternatively—or additionally—possible that the publicity about offences of violence may have caused the police, consciously or unconsciously, to view these offences more seriously and carry out a general upgrading of the legal classification attached to particular sets of facts*." (My italics.) I am not suggesting that there has been no increase in crimes of violence in recent years, but it does seem quite possible that its extent may have been very much exaggerated. And it may well be that the "considerable popular clamour," to which Mr. Justice Salmon refers, has been stimulated and encouraged by figures which are far from giving a true representation of the facts.

Special Treatment?

So much for the dimensions of the problem. Yet whatever the truth may be about that, it is unfortunately true that increased public interest and discussion have produced nothing at all useful to what one may call the practical penologist. He is in the unfortunate position of being unable to participate in the no doubt enjoyable if unfruitful debate, but at the same time being required to deal somehow with the constant stream of offenders who give rise to it. What does he do about it? It is refreshing in this context to be able to provide a short and simple answer to a question. The correct answer to the question "What treatment is given to violent criminals in prison?"—and I am here concerned only with prisons—is that violent criminals receive no special treatment in prison. To this it is necessary to add only one brief qualification. It is this: prisoners who have been convicted of any offence involving violence other than common assault, or with a previous conviction for any such offence, are not as a rule allocated or transferred to minimum-security prisons or open prisons. The reasons for this qualification can be stated equally briefly. If such a prisoner were to abscond from such an establishment and commit a further offence this would be in the interest of neither the public, the prison nor the prisoner himself; and the risk is not usually considered worth taking.

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[5] T. S. Lodge, Appendix to Lord Pakenham's *Causes of Crime*, Weidenfeld and Nicolson, 1958.

What is the explanation for the apparent neglect of this particular type of prisoner? A glance at the latest (1960) edition of the Stationery Office pamphlet " Prisons and Borstals " which provides a statement of policy and practice in the administration of Prisons and Borstal Institutions in England and Wales provides the answer. The third chapter of that publication sets out briefly the purposes and methods of the present system of classification of prisoners. This is based very simply on the division of prisoners into categories according to certain objective criteria, *e.g.*, untried and convicted, civil and criminal, felons and misdemeanants, and by sex and age. Within the category of convicted adult criminal prisoners there is further division, again based broadly on the objective criterion of whether or not the offender has previously served a sentence of imprisonment. This is not the place to give a detailed account of the system, but I should add that it not only involves the negative discrimination indicated above but also a secondary phase directed at ensuring that prisoners are placed in groups in which they will get the treatment most appropriate, not to their offence, but to their needs and aptitudes. The important point to notice, in this context, is that the nature of the prisoner's offence plays no part at all in the initial phase of classification. That it plays some part in the secondary phase is obvious from the nature of the qualification mentioned in the last paragraph. But within the limits set by that proviso allocation to the particular establishment best suited to the particular prisoner will depend upon the individual case. And although it would be idle to pretend that diagnostic observation and assessment is as yet very highly developed it can be said with some assurance that it has advanced beyond the primitive stage at which the nature of the offence committed would itself be regarded as the deciding factor. The same is true of those persistent offenders sentenced to corrective training or preventive detention. The allocation of these prisoners to establishments is decided upon after an investigation, conducted by specialised staff including a psychologist, which covers the whole of the offender's social and criminal history as well as his mental and physical constitution, personality and temperament. In such a context the nature of the particular offence resulting in the current sentence may well seem to have very little significance.

Nearly half a century ago Thomas Mott Osborne—one of the greatest of all penal reformers—resigned from his post as Warden of Sing Sing rather than differentiate between men on the basis of either the nature of crime or length of sentence. The idea that the nature of a man's crime is a reliable index of character and should determine his treatment is in fact an anachronism.[5a]

That it persists is due in part at least to an almost ineradicable human tendency to think in terms of stereotypes. There exists in the public mind a fixed yet amorphous stereotype of the violent criminal. This image of a cowardly, brutal, callous, remorseless thug, totally indifferent to the sufferings of his victims, or to any interests but his own, has a counterpart in real life of course; but anyone with any experience knows that only a small part of the total number of crimes of violence are committed by such men. Another popular, post-war stereotype is that of the teenage hoodlum. Within the last ten or fifteen years for reasons not unconnected with the fact that they belong to a group which, it has been estimated, spends something like £900 million a year, "at their own discretion," what are called teenagers have been given considerable publicity. Not unnaturally, on the "man bites dog" principle, the small anti-social minority of those in this age group have received more than their share of this. As a result many adults are now so attached to the image of the juvenile delinquent that if you point out to them that the rise in the proportion of serious crime committed by those under twenty-one has been less than 1 per cent. since 1939 they look at you as though you had slapped them in the face. Yet it is a fact that whilst in 1939 of the total number of persons found guilty at all courts of indictable offences 50·5 per cent. were under twenty-one, the figure for 1959, despite all the alarums, was only 50·9 per cent. Incidentally, although no newspaper reader would have gathered as much, this represented a decline, for the figure for 1958 was 51·5 per cent. An interesting example of the kind of obliquity of vision induced by the acceptance of stereotypes was the press handling of the latest issue of the criminal statistics. For instance, a reasonably sober and responsible organ like the *Daily Telegraph and Morning Post* published on July 29, 1960, a table showing " the principal crimes of violence and comparative figures for other years." According to this table by far the biggest percentage increase was that of 24·7 per cent. in cases of causing death by dangerous driving, which rose from 162 in 1958 to 202 offences in 1959. Yet this was ignored both in the article dealing with the figures and the editorial. The editorial in fact was largely devoted to " the dominant problem . . . of dealing with youthful offenders " and urged " a wider range of punishments for young criminals " and the provision of more of " the tough detention centres administering short sharp sentences."

[5a] It has been suggested to me by Mr. Bernard Marcus that this is too sweeping a statement. He has brought to my attention certain findings which indicate that in the case of some types of offenders the class of offence is quite a useful pointer to the type of personality. As, however, this does not apply to violent offenders where there is little, if any, association with the extent of criminality or with general social adjustment, it would appear to support my main thesis. (*Vide*, Marcus, B., "A Dimensional Study of a Prison Population," *The British Journal of Criminology*, Vol. I, No. 2, October 1960.)

It is not at all clear to me why the influence of stereotyped images of the thug and the young delinquent should be so pervasive in our thought about these matters. That I have managed to break free from it is certainly not due to superior insight on my part but simply to the fact that I was for a period of two years in close and almost daily contact with a group of between forty and fifty youths who had been convicted of very serious crimes of violence. Let me say something about this both by way of illustration and in order to dispel any idea that I may be one of those people, despised by Dr. Johnson, " apt to think themselves qualified by Books to treat on Subjects which are only to be understood by Observation and Experience."

Long-term Young Prisoners Centre

The presence of all these young men under one roof was not as a matter of fact directly due to their having been convicted of crimes of violence but rather to their age and the length of their sentences. To the long-term young prisoners centre which consisted of a detached cell block within the walls of Wakefield Prison were sent, with few exceptions, all the young men under twenty-one with long prison sentences (*i.e.*, over three years) including those detained during Her Majesty's Pleasure. When I took over, the population consisted, with one exception, entirely of young men who had committed homicides or other grave violent offences ; and this was of course the reason for their long sentences. Because they were all serving long sentences no significant changes in the character or composition of the population took place in the period during which I was in charge of the centre. I therefore had a unique opportunity to study the young violent offender. Some readers will no doubt be relieved to hear that I did no systematic research and can produce no detailed statistical analyses, but I did learn one lesson very well indeed.

The point I want to illustrate was made very simply by Professor L. Radzinowicz [6] in his address to the Second United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in London last August.

" There is," he said, " a great variety within each of the conventional classes lumped together as offences of violence, offences against property or against sex. The differences within these groups in background, in individual make-up, in motivation and in criminal history are often greater that the differences between the classes themselves." I was not, I think, sufficiently naive to expect all of the cases to be alike, but I was certainly not prepared for the immense diversity of character, personality and background which confronted me. As time went on and I grew to know individuals better one facile generalisation after another died on my lips. Indeed, I began to feel that there was something almost perverse about the degree of heterogeneity I encountered.

There was the victim of imagined persecution who had screwed his courage up and turned on his supposed tormentor; the young sadist who had tortured one of his playmates; the youth who, surprised in the commission of a felony, had resorted to panic violence; the young man who killed the girl who jilted him, and another who slew a prostitute because she laughed at his lack of virility; there was the quiet young I.R.A. man and the noisy youth who had been fatally involved in a dance-hall affray; there was the parricide and the matricide, the apparently motiveless killer and the sex murderer. What did they have in common beyond their youth and their present predicament? Some were very intelligent and some were almost feeble-minded; some came from " good homes " and some from what by any standards were " bad homes "; some loved their parents and were loved by them, and others hated them, and one killed them both; some were obviously inadequate and immature and others were mature and sophisticated. There were a number of youths who reminded me of A. E. Housman's young murderer in Shrewbury jail,

> " A better lad, if things went right,
> Than most that sleep outside ";

and at the opposite extreme there were those criminally sophisticated intransigents who before attaining their majority had been written off as irredeemable.

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[6] Professor L. Radzinowicz, LL.D., " Criminological and Penological Research." Lecture deliver to Second U.N. Congress on the Prevention of Crime and the Treatment of Offenders, 1960.

Let me quote from pre-trial reports to illustrate the latter category.

> *Case A*: " An exceeding self-centred and hostile boy who seems rapidly to be developing gross psychopathic characteristics. Treatment suggested: Certification as a moral defective under the M.D. Acts. This boy's history of delinquency is so long standing and is developing in such a dangerous manner that he seems to be irremediably anti-social. For the protection of the public he should be confined in some such place as Rampton Hospital."
>
> *Case B*: " This boy comes into the class properly labelled 'psychopathic.' He appears to be constitutionally incapable of normal social adjustment. Treatment suggested: Certification as a moral defective."

What treatment then was given to this various group of young men? There were as a matter of fact always half a dozen or more receiving individual psychiatric treatment; and all were seen by the principal medical officer, the principal psychologist and the psychiatric social worker, and had their cases regularly reviewed. For the rest they led a communal life of their own, in their own separate cell block, with their own facilities for sport and entertainment. They mixed with other prisoners in the workshops but under the rules governing the treatment of young prisoners they were largely kept separate from all other classes. With few exceptions they sooner or later took vocational training courses in one of the relatively wide variety of skilled trades offered at Wakefield, and at these a number of them did extremely well. The tutor-organiser took a regular bi-weekly morning class for those who were below the normal school leaving age standard, and a wide selection of educational classes, which met in the main prison every evening, was open to them. Some also took correspondence courses, and the young prisoners had their own hobbies class which met twice weekly. Gym and weight training classes were popular and well supported; and athletics, cricket and football played a large part in the lives of many. Every year a party of about twelve selected prisoners who had completed at least two years of their sentences were taken to Portland Borstal for a two-week " working holiday." They worked every morning usually grass cutting and spent every afternoon in the swimming pool. This did a lot for morale and also enabled members of the staff to get to know their charges better under more relaxed conditions. We had attempts—and successful attempts—at escape at Wakefield but no one attempted to break away, despite the greater opportunities, on these annual trips. It would however serve no purpose to recount in detail every aspect of a règime which in most other respects was the same as in any training prison.

If anything at all was achieved it was because of the staff who in most cases were there when I arrived, and remained after I left. It consisted of two principal officers and four other officers all of whom were selected as having the necessary resilience to respond to the demands made by the task of handling often difficult young men, day after day, and year after year. Adolescents commencing long and often indeterminate periods of imprisonment may be expected to view their situation with jaundiced eyes and to react accordingly. And in some cases a record of anti-social behaviour outside was coupled with one of gross indiscipline in other institutions. Inevitably we had trouble, and we had assaults on the staff; fortunately they were not frequent. But I don't want to paint too cosy a picture or pretend that the atmosphere was always that of a "therapeutic community." On the other hand neither was it harshly repressive. One observer[7] who visited us and subsequently published an account of his visit wrote: "It would have been useless to pretend that here was not a collection of the most disastrous youths in the country, for few of whom, were their crimes known, would it have been easy to feel sympathy. Of all of them it could be said that by their actions they had brought misery or worse into the lives of others, and in some cases taken another's life. Yet, sitting in their midst, I was moved—without quite knowing why. And thinking it over afterwards I decided that what had moved me was not so much the inmates . . . as the staff in whose charge they were."

It *was* moving to see men without any specialist training or qualifications display so much insight and understanding, patient good humour, rough kindliness, and, when necessary, courage in the management of those who in the past had often proved unmanageable. And one could be moved by the inmates also. One night after watching a B.B.C. documentary film (for we had a television set) of the Budapest rising, a young prisoner came to give his whole week's wages (1s. 6d.) to Hungarian relief; and another, convicted of a double murder, wanted to give all his savings.

What, in conclusion, can one say about the results of this "treatment"? Dr. Peter Scott[8] of the Maudsley Hospital in an authoritative paper, published earlier this year, on "The Treatment of Psychopaths" concluded by saying that "treatment methods" both in prisons and other institutions "are as yet so ineffective that the primary need (is) not to do further harm." He adds that "all forms of treatment of psychopaths are as yet inadequately assessed"; something which is surely true of the treatment of deliquents generally. As it happens I do not think that any of the young men who were released from the centre, during my time there, left worse than they were on reception. For some this might have been difficult, but not for all; and it is no small claim—to have harmed no one. In some cases possibly maturation had taken place; some may have benefited from psychotherapy; some were never in need of treatment, and for many no treatment has yet been devised. And this of course is the crux of the problem regarding the treatment of violent criminals and for that matter many other kinds of criminals. We know very little about how to change human beings or touch them at the level where the springs of action lie.

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[7] Sewell Stokes, *Come to Prison*, Longmans Green & Co., 1957.

[8] P. D. Scott, M.D., D.P.M., "The Treatment of Psychopaths," *British Medical Journal*, Vol. I, pp. 1641–1646, May 28, 1960.

As a result of the expenditure of vast amounts of money and tremendous material and human resources it seems probable that within the next decade the problem of how to send men to the moon and back will have been solved. One day it may be that equivalent resources will be devoted to tackling problems nearer home. But it would be sanguine to anticipate any feverish rush to be first in the field.

In the present state of our knowledge it is an interesting, if depressing, exercise to examine the sorts of reasons adduced in support of, for example, what Professor Eysenck[9] describes as "the widely held belief, which has no support in factual experiment, that 'psychological treatment' would solve all our problems of penology"; or alternatively the arguments in favour of the even more widely held belief, which is equally unsubstantiated, that the best way to teach people that violence is wrong is by employing it ourselves.

By contrast *Alice in Wonderland* reads like a logic textbook and the Mad Hatter seems the most reasonable of men.

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[9] Professor H. J. Eysenck, *Uses and Abuses of Psychology*, Penguin Books, 1953.

Blood and Forensic Science

By Dr. G. B. Manning, *Department of Forensic Medicine in the University of Manchester*

Introduction

Blood is a suspension of cells in a fluid called plasma. It is a very complex substance both chemically and physically, and the problems associated with it have engaged the attention of many research workers throughout the world for many years. In keeping with its physico-chemical complexity it performs very many functions in the body. From a medico-legal point of view blood is of the highest importance.

Systematic searching of the scenes, weapons, clothing, etc., for bloodstains, and the examination of blood samples from assaulted and suspect persons is now established routine practice in the investigation of crimes of violence.

When trauma causes bloodshed the blood may escape from arteries, veins or capillaries. During life, arteries spurt blood, and this may be evident at a scene of crime or on clothing. An artery cut after death will not spurt blood. Venous and capillary bleeding is in the form of welling of the blood. Wounds of the scalp often continue to ooze blood for many hours after death, and the presence of a large pool of blood under a victim's head does not imply that life continued for some time after the injury was received.

During life, bleeding from a cut stops naturally by closure or partial closure of the damaged blood vessels and by the formation of blood clot. The mechanism of blood coagulation is complicated but some of the constituents involved are derived from damaged body tissues. Cuts made by sharp instruments tend to bleed for a long time because blood coagulation is slow, whereas lacerated wounds from blunt violence with much associated tissue damage tend to stop bleeding quickly.

Blood splashes associated with violence may be caused in several ways. The commonest is by and from the weapon used. One blow from a weapon will not cause blood splashes unless blood is already present on the part hit. Bleeding starts from the injured part after a second or so. A second blow in the same place after this short lapse of time will give blood splashes radiating from the site. Furthermore, the weapon itself now has blood on it and if it is raised for a third blow this blood may be thrown off, usually at a higher level than the first splashes. Indoors it may be found high up on nearby walls and ceiling.

If the victim can move or is moved whilst blood is still issuing from the injuries, this blood often drops to the ground. These drops tend to be rounded in shape, whereas the splashes caused by the weapon become more elongated as the angle at which they hit a surface becomes more acute.

Bruising, that is bleeding into the tissues, may be a matter of concern when observed in a corpse or even in a living person. Old bruising is recognised by naked eye examination because the colour of the bruise is due to liberation of blood pigments. These blood pigments alter and change colour as they get older, giving the characteristic greens and yellows of a fading bruise. A bruise caused shortly before death may be recognised microscopically if the tissues have had time to develop their natural reaction to the trauma. It is usually not possible to distinguish between bruises made just before death and those made just after. A type of bruising may be made some time after death but it can usually be differentiated from those made during life.

Grouping and identification of blood

Several blood group systems are now recognised, one in particular, the CDE or Rh groups containing numerous constituent groups. The blood group pattern is part of the genetic make-up of every individual. It is derived from both parents and remains unchanged (except temporarily after massive blood transfusion) throughout life.

The blood group of every individual being derived from each parent, it follows that a child cannot have a blood group factor not possessed by one of its parents. This is the basis of paternity testing, but in the present state of knowledge many thousands of people possess the same commoner groups. Paternity testing is therefore mainly of value only to the putative father and not the mother. It gives a reasonable chance for a man wrongly imputed with fathering a child to establish his innocence but it cannot as yet prove a man to be the father of any child. Nevertheless, such testing is of medico-legal value, and in countries where it is an accepted procedure in paternity cases it has been found that a goodly proportion of accused men have in fact been wrongly accused.

In the examination of suspect material for blood the tests are directed to trying to establish that a stain is blood, that it is human blood (or whatever species is involved in the investigation) and that it could have come from a certain person or animal.

Visual examination alone is not sufficient since even the experienced investigator may be misled by stains caused by a number of substances which simulate blood. Furthermore, bloodstains on some articles and materials are not always obvious even when the materials are examined in a strong light; even heavy and discrete stains may be masked when on dark cloths, and light, thin smears or dilute stains on many materials may not be patently obvious. Thorough searching necessitates the use of a preliminary screening test usually called a presumptive test. These tests give a positive reaction in the presence of blood, but as a positive reaction is also given by certain other substances the tests are not diagnostic for blood. One of the best known of the presumptive tests for blood is the benzidine reaction. Its striking positive reaction in the presence of blood contrasts so markedly with a negative reaction that the investigator is able to examine quickly and completely large numbers of articles to decide which areas or stains warrant further tests to confirm the presence of blood. The sensitivity of the benzidine reaction is such that, in competent hands, negative results render further tests for blood unnecessary. Owing to difficulties in obtaining benzidine of sufficient purity, there is, nowadays, an increasing tendency to use the less well known orthotolidine test. This test gives similar results to the benzidine test.

Confirmation of the presence of blood in stains giving a positive reaction to one of the presumptive tests is dependent on the identification of the presence of haemoglobin, a pigment present in red blood corpuscles. Some tests using this principle result in the formation of identifiable crystals. Of these the two most commonly used are the Teichmann and the Takayama tests. The Teichmann test results in the formation of haemin crystals and the Takayama test produces haemachromogen crystals in the presence of blood. There is little to choose between these tests or various modifications of them, and the one used depends on the individual preference of the investigator. The presence of haemoglobin can also be demonstrated by obtaining from the stain the characteristic absorption spectrum with a spectrophotometer.

To decide whether the bloodstains have originated from a human or other animal the precipitin test is used. This determines the species from which the protein in the blood is derived. When human blood, for example, is injected into a rabbit a specific antibody is formed in the rabbit's blood. When serum from such a treated rabbit is mixed with human serum the mixture becomes opalescent due to the formation of a flocculent white precipitate. Using this principle, the precipitin test allows the determination of the species from which blood is derived. These tests are always done in parallel with suitable controls to obviate any chance of obtaining a false positive reaction.

When concerned with the identification of human blood some workers prefer the anti-human globulin inhibition test. Both this test and the precipitin test give most satisfactory results in competent hands, and again, personal preference usually decides the choice of method.

Whenever adequate and suitable material which has been proved to be human blood is available to the laboratory investigator, the next stage in blood examination is to attempt classification into the major blood groupings. Blood grouping tests can never establish that either stains or fresh blood originated from one particular individual, but their great value lies in the fact that they may show that they could not have come from that particular individual, *e.g.*, a stain which proves to be human blood of Group A may have originated from any one of the 40 per cent. of the population belonging to Group A; but that stain could not have originated from a person whose blood group was either B or O.

The increasing number of different blood group factors being discovered increases the degree of individuality of human blood, but methods employed in the grouping of dried bloodstains have not kept abreast of the advance in the grouping of fresh, whole blood. Opportunities of obtaining fresh, moist bloodstains in criminal investigations are few, and often the stains are in a soiled and contaminated condition. Blood grouping tests on dried stains are generally restricted to the four groups in the ABO system, and even then it is often not possible to completely reconstruct the blood group.

The limiting factors in the identification of bloodstains are the amount of blood available, the age of the stain and the conditions under which it has been preserved. Positive presumptive tests are obtained on stains when there is insufficient material to enable any of the tests for haemoglobin or human protein to give a result. Still larger amounts of fresher blood are necessary for blood grouping to be carried out. Thus bloodstained clothing after thorough washing usually gives a positive presumptive test in the area of the original stain but it is rarely possible to take the examination further.

The Law Versus Prostitution

By A. E. JONES, *Magistrates' Clerk*

The Street Offences Act, 1959

There is no doubt that the Street Offences Act has, for the time being, at least, achieved its main object of abating the public scandal caused by prostitutes soliciting in the streets. A number of problems have however arisen in the practical application of the law. Because these developments were not fully foreseen by the legislature (or, if foreseen, were not fully provided for) the police have been considerably handicapped in their practice and procedure to prevent the eventual emergence of a worse state of affairs than that which the Act of 1959 was designed to prevent. Some of the women concerned have hoped to evade the law by retreating into doorways and windows for the purpose of soliciting passers-by in the street. But these devices have not usually commended themselves to magistrates; and, recently, in *Smith and Others* v. *Hughes and Others* (*The Times*, June 16, 1960), the High Court has decided that soliciting by tapping a window and making signs from inside premises in order to attract the attention of men in the street is soliciting in the street, because the solicitation is "projected to" someone in the street.

Driving the prostitutes off the streets has, however, as most people foresaw, led to the development of new and the intensification of old ways of enabling them to meet their clients. At first, male touts were to be found openly accosting men in the streets and public places with information as to the address and charges of the woman or women they were recommending. The The police met this by charging the touts under section 32 of the Sexual Offences Act, 1956, with persistently importuning for immoral purposes. This particular provision of the law (formerly section 1 of the Vagrancy Act, 1898) has for many years now been used almost exclusively to deal with soliciting by male homosexuals, and it might seem that its employment against procurers of women was a novel development. In fact, however, the Act of 1898 was originally passed with precisely the intention that it should be a weapon against the "bullies" of the period. It is clear from statements in Parliament at the time, that the offences of "importuning" was regarded merely as auxiliary to the main offence of "living on immoral earnings" contained in the first part of the section; and there was never any suggestion that it would prevent homosexuals from making public nuisances of themselves. It seems impossible, at this date, to ascertain when "importuning" began to be used as a charge in what is now the "normal" way. Whoever brought the first of such prosecutions must have been responsible for as startling an innovation at the time as was the recent extension of the offence to cover solicitation by men of women. Incidentally, the Sexual Offences Act has removed the statement of the offence from the former close contact with the "living on immoral earnings" offence in which it was placed in the original enactment of 1898.

Advertising

Crude touting by procurers has—perhaps because of prosecutions for importuning—largely given place to more subtle methods of achieving the same objects. One is the sale of "directories" containing advertisements which supply names and addresses (or telephone numbers) of women who, though sometimes described as models, are referred to in terms which, by innuendo, convey not only that they are prostitutes, but, also, which perversions they particularly cater for. The phrases used are not openly obscene, and the police have been in some difficulty when urged to take action against the vendors or publishers of such "directories." In this connection, proceedings by the Director of Public Prosecutions, the hearing of which has not yet been completed, may prove to be of importance. The charges in this case are (1) publishing an obscene article, (2) living on immoral earnings, and (3) an offence of conspiracy to induce persons to resort to fornication and other immoral behaviour, charged as being contrary to that part of the common law which derives from the Crown's role as guardian of the country's morals.

Advertising of prostitutes is not confined to specialised "directories." The boards which many small shops carry outside their premises for the display of small notices are being increasingly used for this purpose in certain districts. Indeed, the trade is becoming so lucrative that there is even a "shop" which has its whole window filled with such advertisements and has no goods inside to sell. The advertisers almost invariably describe themselves as "models," and give a fancy forename with an address or telephone number. Here again, it is not easy for the police to take effective action, because of the veiled language used. No prosecution appears to have been ventured under section 3 of the Indecent Advertisements Act, 1889, which legislated against all advertisements of "an indecent or obscene nature." The police have, so far, met the situation mainly by trying to prevent people from congregating to read these advertisements; and prosecutions for wilfully obstructing the footway—or, even, wilfullly obstructing an officer in the execution of his duty— have resulted from the refusal of some individuals to "move on." But groups round shops of this kind are no larger than those frequently tolerated round reputable shops, and it may be said that the police have no right to discriminate because of what is displayed when they are not prepared to charge any offence in relation to that display. In any case, prosecuting members of the public for footway obstruction does not worry the real culprits—the people who make money out of the advertisements. It would seem a fairly simple matter for regulations to be made under the Town and Country Planning Act which would prevent these abuses of the art of advertising. The Minister has power to regulate the display of advertisements 'so far as appears to be expedient in the interests of amenity. . . ." In the past, also, special legislation has been enacted on various occasions to control advertising of specific matters in the public interest—for instance, the cure of venereal disease.

In addition to advertising by individual prostitutes, there have been a number of instances of advertising by brothels; this has usually taken place in newspapers, but there is no suggestion that the editors had any knowledge of the real character of the advertisers. The device employed is to purport to give some form of therapy, and to use descriptive terms which will be understood by those who want the kind of immoral services actually provided. In a recent brothel keeping case typical of this kind "manipulative treatment" was the advertised purposes of the establishment in question, but it was contended by the prosecution that this meant—and would mean to the reader aimed at—"masturbation." The defendants stoutly maintained that their staff of young women —none of whom had any technical qualifications—were employed solely as therapists; they were, however, constrained to admit that what one of the women was found by the police to be doing with a male client was not an orthodox treatment. A conviction was registered in this case, but it is not easy for police observation to establish that premises of this nature are, in fact, used as a brothel. The women are rarely known prostitutes, and the business is usually carried on during the daytime, just as in the case of the many perfectly respectable clinics where massage and other healing techniques are practised. A court will naturally require cogent evidence before granting a warrant to initiate proceedings of this sort, and, without a warrant, the prosecution will lack the clinching evidence of what is actually found to be going on when the premises are "raided."

In London special legislation passed "for the prevention of immorality" requires a licence to be taken out for "any premises used or represented as being intended to be used for the reception or treatment of persons requiring massage, manicure, chiropody, light, electric, vapour or other baths, or other similar treatments." Conditions may be attached to the licence, and the premises are open to inspection by officers of the council at any time. The London County Council did not feel itself authorised to require a licence to be taken out for giving "manipulative treatment" in the case mentioned, and so the defendants, after a visit from one of the council's inspectors to verify that massage was not being given, were allowed to continue their activities without further interference from the Council. It seems odd that it should be possible to get round the law merely by making "manipulation" the dirty word instead of "massage." Under the London County Council (General Powers) Act, 1920, the Council have power, subject to Home Office approval, to apply the Act to any premises advertised as "being used for some legitimate business, but . . . in fact being used for immoral purposes." Legislation subjecting all alleged therapeutic establishments to inspection and conditions as to staffing and advertising would stop further immoral abuses, as it has done in the case of massage establishments.

"Hostesses"

A still further product of the shortage of prostitutes in the streets is the sham prostitutes. She invariably describes herself as a "hostess" and is employed by what is usually termed a "near beer" establishment. This carries on its business, as a general rule, in one, dimly lit, basement room. The "hostess" inveigles men into the establishment from the street on the promise of having intercourse with them for a named sum. As a preliminary, the man has to order drinks which are sold at a fantastic price and have not even the most distant relationship with beer. The next step is to get the man to hand over money for intercourse; this is achieved by pretending that it is wanted to release the key of the flat, or as security to the management for the return of the girl, or on some other pretext. The man is then told to wait for the girl a little way down the street, and, of course, she never comes.

When soliciting men to come into these establishments the "hostesses" cannot be charged under the Street Offences Act because they are not common prostitutes; at any rate they take care not to have intercourse with their clients. The recent case of *Bryan* v. *Robinson* (1960) 2 All E.R. 173 decided that there was not likely to be a breach of the peace if a young women smiled at and beckoned to men in the street, and, accordingly, the charge under section 54 of the Metropolitan Police Act, 1839, would not lie if that was all that could be alleged against the woman charged. In his judgment Lord Parker C.J. said "the appellant is merely touting for this refreshment house. There is no suggestion that it was a disreputable establishment or brothel, or that solicitation was for the purposes of prostitution." Later on, he said, however, "There is little doubt that this practice in London may be highly objectionable and it may be that steps will have to be taken to prevent this sort of thing occurring."

Because these establishments are open after 10 p.m. they are required to be licensed under the Refreshment Houses Act, 1860; but the licence is purely a revenue one. There is no power to refuse it to anyone applying, and no question as to the character of the applicant or the premises arises. If refreshment houses were subjected to a code similar to that governing public-houses, abuses of the kind mentioned—and other disorders—would become as rare as they have been made in premises licensed for the sale of intoxicating liquor.

The only charge immediately available to the police in connection with soliciting by a "hostess" is, in appropriate circumstances, that of wilfully obstructing the footway—which carries a maximum penalty of 40s. So far as prosecution for what takes place in a "clip joint" is concerned, they are dependent on complaints from private individuals, and comparatively few men who have been defrauded in this way are willing to advertise their folly (recently, however, magistrates have allowed the names and addresses of complainants to be written down and not disclosed in court). When a charge is brought on the man's complaint it is normally for larceny by a trick—on the analogy of welshing on a racecourse, when, likewise, one party to an illegal contract never intended to carry it out. Sometimes there is evidence to link the management of the premises with the actions of the "hostess" or "hostesses," and then a charge of conspiracy to cheat and defraud may be possible. Apart from this, there seems to be no action which can be taken, in the present state of the law, against the organisers of these enterprises.

In this, as in a number of other instances mentioned, legislation has failed to keep pace with the ingenuity of the business men of vice. As soon as a restrictive statute is passed certain people always set to work to try to find ways round it; and, too often, when they are successful, Parliament does not find time to deal again with that particular subject until a number of evil-doers have enjoyed many years of profitable anti-social activities. What is required is some method of making the law more prompt and more supple in dealing with changing social phenomena. It is probably impossible to stop women from making a living as prostitutes if they want to—and the legislature has not attempted the task—but it should surely be possible for the law-enforcing agencies of this country to prevent other people making a living out of prostitutes. In that way prostitution can, at least, be kept within socially acceptable bounds. The present danger is that the Street Offences Act will lead to more living on the earnings of prostitution and more thrusting of prostitution on the attention of the public than ever before.

Case and Comment *

AIDING AND ABETTING

Road traffic—taking and driving away contrary to the Road Traffic Act, 1930, *ss*. 28 (1) *and* 35 (1)

D. (AN INFANT) v. PARSONS, *post*, page 711.

PROSTITUTION

Soliciting from a window—held contrary to the Street Offences Act, 1959, *s*. 1 (1)

Smith v. Hughes

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Hilberry and Donovan JJ.: [1960] 1 W.L.R. 830.[1]

Prostitutes, who were standing on a balcony or behind windows in their house, solicited men who were passing by in the street, either by tapping on the balcony rail or on the window pane.

Informations were preferred against each prostitute, charging that she, being a common prostitute, did solicit in a street for the purpose of prostitution, contrary to section 1 (1) of the Street Offences Act, 1959.

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* Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. In the absence of Professor J. C. Smith, M.A., LL.B., Barrister-at-Law, the commentaries are by Mr. David Calcutt, M.A., LL.B.

[1] For the prostitutes: *Michael Beckman* (instructed by S. Cook & Green). For the prosecutor: *Paul Wrightson* (instructed by the Solicitor, Metropolitan Police).

Section 1 (1) provides that " It shall be an offence for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution."

The prostitutes were convicted. They appealed to the Divisional Court.

Held, dismissing the appeals, that on a true construction of section 1 (1) of the Act, it mattered not where a prostitute stood: if her solicitation was projected to and addressed to somebody walking in the street, she was guilty of an offence against section 1 (1). [D. C.].

Commentary. Lord Parker C.J. approached this case by considering the mischief against which the Street Offences Act, 1959, was aimed. " Everybody," he said, " knows that this was an Act intended to clean up the streets, to enable people to walk along the streets without being molested or solicited by common prostitutes. Viewed in that way, it can matter little whether the prostitute is soliciting while in the street or is standing in a doorway or on a balcony, or at a window, or whether the window is shut or open or half open; in each case her solicitation is projected to and addressed to somebody walking in the street. For my part, I am content to base my decision on that ground alone." [D. C.]

ROAD TRAFFIC

Crossing—" limits " within regulation 4 *of the Pedestrian Crossings Regulations*, 1954

Hughes v. Hall

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Byrne and Donovan JJ.: [1960] 1 W.L.R. 733.[2]

A car driver, having passed over the approach studs of an uncontrolled crossing at the time when a pedestrian stepped on to the striped portion of the crossing, failed to stop. He was charged with having committed an offence under regulation 4 of the Pedestrian Crossings Regulations, 1954.

The justices dismissed the information.

Regulation 4 provides that " Every foot-passenger on the carriageway within the limits of an uncontrolled crossing shall have precedence within those limits over any vehicle and the driver of the vehicle shall accord such precedence to the foot-passenger, if the foot-passenger is on the carriageway within those limits before the vehicle or any part thereof has come on to the carriageway within those limits."

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[2] For the prosecutor: *D. T. Lloyd-Jones* (instructed by Bell, Broderick & Gray for Guest, Vaughan & Pritchard, Old Colwyn). The defendant driver did not appear and was not represented.

Held, allowing the appeal, that on the true construction of the Regulations " the limits of an uncontrolled crossing " are the studs bordering the striped crossing and not the studs indicating the approach to the crossing; and that the driver was therefore guilty of an offence.

Per Lord Parker C.J.: " Regulation 4 imposes an absolute duty; . . . it is quite immaterial whether there is any evidence of negligence or failure to take reasonable care." [D. C.]

Commentary. This decision corrects a misapprehension which is at present shared not only by the justices who tried the case, but also by many motorists. The court's interpretation of the regulations is unquestionably correct. As Lord Parker C.J. pointed out, " The approach studs are dealt with in these regulations not as within the limits of the uncontrolled crossing, but as something on each side indicating the approach to the uncontrolled crossing." It is, nevertheless, respectfully submitted that if the law were to the contrary—*i.e.*, if the approach studs marked the limits of the uncontrolled crossing—greater road safety would be achieved. Many pedestrians are in the habit of stepping on to the crossing just before a car reaches it, their intention is to pass behind the car imediately it has passed, thereby causing the least inconvenience not only to themselves but also to traffic on the road. The driver of the car, however, is placed in a most unenviable dilemma: he must choose between standing on his brakes, with all the dangers which that involves, and driving on, and so flouting the law at his peril. [D. C.]

Taking and driving away contrary to the Road Traffic Act, 1930, *ss.* 28 (1) *and* 35 (1)*—whether pillion passenger aiding and abetting*

D. (An Infant) v. Parsons

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Donovan and Davies JJ.: [1960] 1 W.L.R. 797.[3]

A motor-cycle had been taken and driven away without the consent of the owner. Later the same day F. was seen driving the motor-cycle. He was carrying D. as a pillion passenger. F. and D. were both aged fifteen, and had been friends for four years. Both were stopped by the police, and D. said that he knew nothing about the motor-cycle being stolen. Both were charged with offences against sections 28 (1) and 35 (1) of the Road Traffic Act, 1930. F. pleaded guilty; D. pleaded not guilty.

D. gave evidence to the effect that F. had told him that he

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[3] For D.: *Samuel Lincoln* (instructed by Burnett L. Elman). For the prosecutor: *Paul Wrightson* (instructed by Solicitor, Metropolitan Police).

(F.) was the owner of the motor-cycle, and that F. had offered him a ride. D. was convicted of both offences; and his appeal against conviction was dismissed by quarter sessions. The appeals committee was of the opinion that the evidence clearly established that both F. and D. were acting in concert in together taking and driving away the motor-cycle, and in together using it without the requisite policy of insurance.

Held, allowing the appeal, (1) that although a jury might infer, from the position in which D. was found, that he was a party to the original taking, the mere fact that he was found in such a position did not of itself prove that he was such a party; and, in the present case, there was evidence neither of a joint enterprise nor that D. had been a party to the original taking; and that D. had been wrongly convicted of an offence against section 28 (1) of the Act; and (2) that the fact that D. accepted a lift from F. was not sufficient evidence to justify the conviction of D. for knowingly aiding and abetting F. in the commission of an offence under s. 35 (1) of the Act. [D. C.]

Commentary. This case illustrates with some force the decision in *R.* v. *Stally* [1960] Crim.L.R. 199; [1960] 1 W.L.R. 79 where the Court of Criminal Appeal held that unless a jury are satisfied upon the evidence that D. has actually been a party to the act of taking and driving away a motor-vehicle by F., then D. cannot be convicted of the offence. Merely to show that F. has taken the vehicle and that D., being in the car with F., has very good reason to believe that the vehicle has been taken, or even to show that D. might have realised that F. had taken the vehicle without the owner's consent is not enough to constitute the offence on the part of D.

The court's decision on the second charge, *i.e.*, using the vehicle without third party insurance, was based on the consideration that the evidence here did not establish a joint venture by D. and F., and that there was therefore no justification for convicting D. of knowingly aiding and abetting the commission of the offence by F. [D. C.]

Principles of Punishment

Sentences in the Court of Criminal Appeal

Prepared by HENRY PALMER, *Barrister-at-Law*

Burglary

In R. *v.* APPLEBY the court (Cassels, Davies and Salmon JJ.; July 28, 1960) substituted a sentence of nine months' imprisonment for a sentence of Borstal training. A. had pleaded guilty at quarter sessions to burglary and larceny and two offences of housebreaking and larceny. A., who was a man of twenty-one years of age, had five previous convictions. The offences were committed with other young men who were dealt with by short sentences of imprisonment (six months and nine months) and by fines. The court stated that having regard to the sentences passed upon his companions in these crimes and to the fact that the appellant was only one month under twenty-one at the date of sentence, the sentence of Borstal training would be varied to one of nine months' imprisonment.

Factory-breaking

In R. *v.* MARTIN the court (Cassels, Davies and Salmon JJ.; July 28, 1960) reduced a sentence of seven years' preventive detention to one of eighteen months' imprisonment. M. had pleaded guilty at quarter sessions to factory-breaking and larceny. M., who was a man of thirty-three years of age, had thirteen previous convictions. The present offence was committed when M., with a companion, broke into a factory and stole a very small amount of property and 14s. 1½d. in cash. M.'s companion, who had nine previous convictions, was sentenced to twelve months' imprisonment. M.'s longest previous sentence was three years' imprisonment. The court stated that, in all the circumstances, this was not a case for preventive detention. Accordingly, a sentence of eighteen months' imprisonment would be substituted for the sentence of seven year's preventive detention.

Larceny

In R. *v.* LANSBURY the court (Hilbery, Donovan and Winn JJ.; July 26, 1960) substituted a sentence of nine months' imprisonment for a sentence of Borstal training. L., who was a young man of twenty years of age, had pleaded guilty to stealing a suitcase from a cloakroom at a railway station. One other offence of larceny, namely, stealing a wrist-watch, was taken into consideration. L. had three previous convictions. He had been twice placed on probation for stealing bicycles and, finally, was given Borstal training for office-breaking. He was released from Borstal on licence in January 1959 and, according to the probation officer, worked satisfactorily until the commission of the present offence in February 1960. The court stated that the Prison Commissioners had reported that they did not propose to issue an order of recall, and that they considered a fresh sentence of Borstal was unlikely to be of advantage. Having regard to that report, the nature of the offences and the record of the appellant, a further sentence of Borstal training was inappropriate; and, accordingly, a sentence of nine months' imprisonment would be substituted for the sentence of Borstal training.

Shopbreaking

In R. *v.* HANCOX the court (Cassels, Davies and Salmon JJ.; July 27, 1960) reduced a sentence of ten years' preventive detention to one of seven years' preventive detention. H. had been convicted at quarter sessions of two offences of shopbreaking and larceny and one of school-breaking and larceny. H., who was a man of thirty-five years of age, had twelve previous convictions for dishonesty. He had been to corrective training and had seven sentences of imprisonment since 1947. He was last released from prison in February 1960. The court stated that H. was undoubtedly well qualified for preventive detention. He had conviction after conviction for dishonesty and, after his last release from prison, immediately started committing crime. However, he was only thirty-five years of age and this court had come to the conclusion that on the whole the sentence of ten years' preventive detention was too high. Accordingly, that sentence would be reduced to one of seven years' preventive detention.

Threatening to murder

In R. *v.* HAYES the court (Cassels, Davies and Salmon JJ.; July 25, 1960) reduced a sentence of twenty-seven months' imprisonment to one of twelve months' imprisonment. H. had pleaded guilty at quarter sessions to threatening to murder and, on another indictment, to receiving; he was conditionally discharged. After a subsequent conviction for using threatening words in a public place and wilful damage, he was brought back to the quarter sessions for breach of his conditional discharge and sentenced to twenty-seven months' imprisonment on the first indictment and to one day on the second. H., who was a man of thirty-two years of age, had three previous convictions. The court stated that they had asked for a medical report in this case. It appeared that the appellant was a borderline case, not quite certifiable as a mental deficient but very nearly; but he was not thought to be a dangerous person. This court considered that, in the circumstances, the sentence passed was excessive and, accordingly, the sentence of twenty-seven months would be reduced to one of twelve months' imprisonment. No doubt the doctors would have the appellant under notice whilst he was in prison, and the prison authorities had power to deal appropriately with the matter.

Acts and Orders *

Criminal Procedure

Rule 12 of, and the Schedule to, these rules replace the existing terms set out in the Schedule to the Criminal Appeal Rules, 1908. The other Rules make minor amendments to the Criminal Appeal Rules, 1908, and in particular rules 10 and 11 modify the Rules in relation to an appeal from an Order made under Part V of the Mental Health Act, 1959. Operative November 1, 1960. CRIMINAL APPEAL RULES, 1960 (S.I. No. 1260) (9d.).

Explosives

The amount of explosive which may be carried in one enclosed carriage on a private railway under byelaws made under the provision of sections 37 and 39 of the Explosives Act, 1875, is increased from 15,000 lb. to 16,000 lb. Operative August 8, 1960. EXPLOSIVES (CONVEYANCE) (PRIVATE RAILWAYS) BYELAWS, 1960 (S.I. No. 1347) (2d.).

Food and Drugs

These regulations, which apply in England and Wales and come into force on November 1, 1960, require all butchers' meat and imported meat which is unfit for human consumption to be sterilised, and all knacker meat to be stained or sterilised, before entering the chain of distribution. Provision is made whereby zoos, menageries, mink farms, trout farms and processors may obtain such meat unstained and unsterilised if it is transported in locked containers or vehicles. Supplies of meat to hospitals, medical or veterinary schools or similar institutions for instructional or diagnostic purposes and to manufacturing chemists for the manufacture of pharmaceutical products are unaffected by the regulations. The different categories of meat are defined in regulation 2 (1). The regulations are to be enforced by local authorities and port health authorities, and prescribe the maximum penalties provided for in section 106 of the Food and Drugs Act, 1955. MEAT (STAINING AND STERILISATION) REGULATIONS, 1960 (S.I. No. 1268) (4d.).

Councils are authorised to appoint officers holding the Royal Society of Health Certificate in Meat Inspection to act as meat inspectors under the Food and Drugs Act, 1955. Operative August 12, 1960. AUTHORISED OFFICERS (MEAT INSPECTION) REGULATIONS, 1960 (S.I. No. 1411) (2d.).

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* Prepared by F. MAURICE DRAKE, *Barrister-at-Law*.

Gaming and Wagering

BETTING AND GAMING ACT, 1960 (8 & 9 Eliz. 2, c. 60) (3s.). This Act, which comes into force on the day appointed by the Secretary of State makes extensive amendments to the law with respect to betting and gaming, makes certain other amendments with a view to securing consistency and uniformity in, and facilitating the consolidation of the law with respect to betting and gaming and lotteries, and for purposes connected therewith. The detailed provisions of the Act will be dealt with in a future issue of *Criminal Law Review*.

London Traffic

The following Orders have been made detailing prescribed routes: S.I. Nos. 1281 (St. Albans) (2d.); 1406 (Shoreditch) (3d.); 1407 (Stepney) (2d.).

The following Orders have been made prohibiting waiting: S.I. Nos. 1207 (Amersham-on-the-Hill) (2d); 1228 (Dorking) (3d.).

The following Order has been made relating to weight restriction: S.I. No. 1399 (Wandsworth) (2d.).

A speed limit of 50 m.p.h. was imposed on the driving of mechanically propelled vehicles on certain lengths of trunk road and on lengths of Sidcup Road (Route A. 20), Woolwich, in the London Traffic Area, specified in the Schedule to the Regulations during certain specified periods in July, August and up to September 5, 1960. Operative July 29, 1960. LONDON TRAFFIC (50 M.P.H. SPEED LIMIT) REGULATIONS, 1960 (S.I. No. 1198) (3d.).

For penalties for contraventions see section 10 of the Road Traffic Act, 1930, as amended by section 2 (2) of the Road Traffic Act, 1934.

Merchandise Marks

The principal Order is amended by exempting wooden tobacco pipe bowls with a bore in the stem of 4 mm. or less from the requirement to bear an indication of origin upon importation into or sale or exposure for sale in the United Kingdom. Operative August 17, 1960. MERCHANDISE MARKS (IMPORTED GOODS) No. 2 ORDER 1934, AMENDMENT ORDER, 1960 (S.I. No. 1365) (3d.).

Police

The Police (Overseas Service) Act, 1945, empowers the Secretary of State to make regulations for the government and discipline of persons engaged under his control in the performance of police duties in any territory outside the United Kingdom. The Nyasaland Police Unit has been established under the control of the Secretary of State for the Colonies for police duties in Nyasaland.

These regulations provide for the appointment, discipline, resignation and discharge of members of the Unit. Operative August 1, 1960. POLICE (OVERSEAS SERVICE) (NYASALAND) REGULATIONS, 1960 (S.I. No. 1299) (3d.).

Road Traffic

The Road Traffic Amendment Act, 1960 (8 & 9 Eliz. 2, c. 51) came into force on September 1, 1960. For the effect of this Act see [1960] Crim.L.R. 591.

ROAD TRAFFIC AND ROADS IMPROVEMENT ACT, 1960 (8 & 9 Eliz. 2, c. 63). Operative in part September 1, 1960, and as to the rest (ss. 11, 13 (1 to 7, 9, 10) and 15) on a day to be appointed by the Minister of Transport in England and the Secretary of State in Scotland. This Act is designed to facilitate the enforcement and administration of the law relating to road traffic by providing for the punishment without prosecution of offences in connection with lights or reflectors on vehicles, obstruction, waiting, parking and kindred matters, and for the employment of traffic wardens in aid of police; to amend the law respecting parking places, the regulation of traffic and the costs of removing and storing vehicles and to provide for the disposal of abandoned vehicles and to make temporary amendments of the law relating to highways in the metropolitan police district and the City of London.

Section 1 provides for the punishment without prosecution of offences in connection with lights, reflectors, obstruction and parking. Where a constable finds a person on any occasion and has reason to believe that he is committing or has committed an offence to which the section applies, he may give him a notice in writing in the form prescribed (which is to be prescribed by regulations made by the Secretary of State). This notice gives the person on whom it is served the opportunity to discharge his liability to conviction of the offence by payment of a fixed penalty to a justices' clerk within twenty-one days of the receipt of the notice, or such longer period as may be specified therein. The notice must specify the offence alleged and give reasonable information by way of particulars thereof, and state the justices' clerk to whom, and the address at which, the fixed penalty may be paid. The constable may affix the notice to the vehicle instead of serving it on the alleged offender, and this is deemed good notice (s. 1 (7)). It is an offence for any person other than the driver or owner of the vehicle to remove or interfere with a notice so affixed to a vehicle, and the penalty for contraventions is a sum not exceeding £5 on summary conviction. The fixed penalty for the offence alleged in the notice is £2 or one-half the maximum fine to which a person not previously convicted is liable on summary conviction of the offence, whichever is the less (s. 1 (8)). Section 1 (13) provides for the application of the section with the necessary amendment references to Scotland. Section 2 empowers police authorities in England and Wales to appoint traffic wardens to aid the police in discharging functions normally carried out by the police in connection with the control and regulation of road traffic or with the enforcement of the law relating to road traffic. These traffic wardens may only discharge such functions as are prescribed as appropriate for the purpose, by order of the Secretary of State made by Statutory Instrument subject to annulment or in some cases express approval by each House of Parliament (s. 2 (3)). Traffic wardens may only perform their duties in uniform, which is to be prescribed by the Secretary of State. Section 2 further provides for the details regarding the employment, status and terms of employment of such traffic wardens. Section 3 empowers the Minister of Transport during the period of five years following the coming into operation of the section to make designation orders under section 85 of the Road Traffic Act, 1960 (which relates to the provision on highways of places where charges may be made), without prior reference to the London and Home Counties Traffic Advisory Committee. The procedure for making such orders on application to the Minister is dealt with in section 3 (2); section 4 deals with the making of such designation orders by the Minister without application being made to him. Designation orders outside the London Traffic Area are dealt with by section 5. Section 6 makes certain amendments as to proceedings for contraventions of designation orders, and section 7 limits the right to challenge designation orders in legal proceedings by imposing a time limit of six weeks from the date on which the order is made, during which the validity of the order or any of its provisions may be so challenged. Sections 8 and 9 empower the Minister to make regulations for controlling or regulating traffic and respecting traffic signs within the London Traffic Area during the next five years without reference to the London and Home Counties Traffic Advisory Committee. Section 10 contains financial provisions in connection with the provision of temporary parking accommodation in the London area, and section 11 makes similar provision in regard to local authorities' parking places outside London. Section 15 makes provision for the cost of removing and storing vehicles which have been removed from the street, and section 16 empowers the competent authority to dispose of abandoned vehicles and contains financial provisions relating to the costs of a removal and sale. Other provisions in the Act relate to the improvement of roads in the London area, and make minor and consequential amendments to the Road Traffic Act, 1960.

The Traffic Signs General Directions, 1957 (S.I. 1957, No. 13) are further amended so as to provide that the colouring of the posts used to support certain traffic signs, as required by paragraph 42 of the principal Directions as amended, shall be in alternate black and yellow bands instead of in alternate black and white bands. Operative July 15, 1960. TRAFFIC SIGNS GENERAL DIRECTIONS (No. 2), 1960 (S.I. No. 1208) (2d.).

Section 19 (1) of the Road Traffic Act, 1956, has been applied to the areas of the county boroughs, boroughs and urban districts specified in article 2 of this Order, thus enabling the Minister of Transport by order on the application of those local authorities to designate parking places on highways in their areas for vehicles, and those councils to make charges for vehicles left in such parking places. Operative July 31, 1960. PARKING PLACES (EXTENSION OUTSIDE LONDON NO. 2) ORDER, 1960 (S.I. No. 1302) (2.).

The Motor Vehicles (Driving Licences) Regulations, 1950 (S.I. 1950, No. 333) as amended, are further amended by making certain verbal alterations as are required by virtue of the wording of the Road Traffic Act, 1960. These Regulations do not in any way effect any change of substance in the provisions of the 1950 Regulations. Operative September 1, 1960. MOTOR VEHICLES (DRIVING LICENCES) (AMENDMENT) REGULATIONS, 1960 (S.I. No. 1424) (3d.).

Scotland

General directions have been given by the Secretary of State with respect to the erection of traffic signs prescribed by the Traffic Signs (Speed Limits) Regulations, 1960 (S.I. 1960, No. 1124), which it is the duty of local authorities in Scotland to erect in their areas for the purpose of securing that guidance is given to drivers of motor vehicles as to whether or not a speed limit of 30 m.p.h. or 40 m.p.h. applies on a length of road. Operative August 4, 1960. TRAFFIC SIGNS (SPEED LIMITS) (SCOTLAND) DIRECTIONS, 1960 (S.I. No. 1319) (3d.).

Books and Periodicals

The English Prisons. By D. L. Howard. Illustrated. Methuen. 174 pp. 21s.

Everyone is interested in crime, nobody in prisons. That must, at least sometimes, be the *cri de coeur* of the prison administrator as well as the reformer. Probably the lack of popular literature on the subject is partly to blame, but this lack is now less serious than it was only a few months ago. To the informal but searching scrutiny of the prison community by the secretary of the Howard League is now added a historical perspective of our prisons by the husband of the assistant secretary, already a biographer of John Howard. This too is a useful book, filling an obvious gap, and on the whole filling it well. To be reminded in this way of what was done to prisoners in this country only a few generations ago is a chastening experience; it also provokes some hard thinking about what is being done with them today.

Where, unfortunately, Mr. Howard does go a little astray is in his chapters on transportation to Australia. This was an important episode in British penal history and he was right to include it, but he has, alas, been content to rely on out-of-date and one-eyed authorities like John Dunmore Lang (who, incidentally, is here called " Laing "). Both text and bibliography suggest he has not consulted modern sources such as Dr. Eris O'Brien's study of the original penal settlement. What is more, he implies that transportation stopped in the fifties, whereas it was carried on to Western Australia until 1867. Nor does he get his references to Alexander Maconochie quite right; it is a pity he was unable to consult Mr. Justice Barry's recent biography. It might be worth revising these chapters in time for the second edition—the book certainly deserves ample reprinting.

Anyone who expects to find a comprehensive tracing of the development of individual institutions will be disappointed; that would have demanded a lot more space and research and, one hopes, will one day get it. Nor is the book exclusively history. Mr. Howard read criminology under Hermann Mannheim and was for two years education officer at Eastchurch Prison. Like Mr. Klare's his ultimate chapters in which he turns to the future are discerning and well worth reading. He is certainly justified in emphasising that, until we get appropriately designed prisons and appropriately trained staff, it would be foolish to expect much of reformatory policies. There is too a good case for decisively reversing at last the trend towards centralised control and giving all governors a good deal of discretion to experiment. As things are, having abandoned the separate system for sound humanitarian reasons we virtually force a convicted man, as Mr. Howard points out, " into membership of a powerful social organism whose accepted ways of behaviour and whose framework of obligation and esteem are entirely directed against conventions of the community outside prison."

Governmental parsimony (a reflection of public apathy) has a lot to answer for, but the fundamental impediment to effective progress probably lies in the persistent reluctance, apparently shared by this author, to re-examine the alleged functions of punishment and their possible irreconcilability. It is unfashionable these days, for example, to pay attention to the deterrent function of imprisonment. Lady

Wootton ignored it in her Cambridge lecture, though it is quite consistent with a thorough-going determinism. Mr. Howard himself is content to tell us that "deprivation of liberty, no matter how humane the conditions in which it is enforced, remains today as a great a deterrent as it was in the eighteenth century." He does not state how he can be so confident about this.

No doubt, as we are told, many crimes are committed without a careful thought of the consequences. All the same, probability of capture apart, is a predictable fixed sentence (with predictable remission for a negative sort of good conduct) served perhaps in an open prison self-evidently as daunting to a professional criminal as incarceration in an eighteenth-century gaol would have been or transportation across the world with no return fare? And is the only limit to the comforts to be introduced in prison really the budgetary confines endured by the Prison Commissioners? To ask these questions is not to advocate a single step back to the nightmarish recent past conjured up by Mr. Howard. The fact remains that they ought to be considered, if the suspicion is to be avoided that we are making the worst of both worlds, reformation and deterrence. At present, a man who has served his time is released however strong the likelihood of his repeating his offence. One possible way of combining deterrence with real reformation and protecting society meanwhile would be to develop indeterminate sentences—and that takes us back to Maconochie.

NOEL MALACHLAN.

Harris's Criminal Law. 20th ed. By H. A. Palmer and Henry Palmer, Barristers-at-Law. London: Sweet & Maxwell. 1960. li + 688 pp. + index. Price 45s.

In this new edition, the authors have re-arranged and regrouped their material in a way which should greatly facilitate reference, and have added a most useful part devoted to punishments and orders on conviction, which avoids a lot of duplication of material in the remainder of the book. The standard of production being as high as in previous editions, the result of their labours is a book which is a pleasure to handle, and convenient to consult over a very wide range of matters connected with criminal law and procedure.

That *Harris* has reached its twentieth edition proves it value as one of the leading introductions to criminal law, and it might seem somewhat captious for a reviewer at this stage to point out some of its defects. Still, the defects being there, it is felt that it is time to draw attention to them, especially as this edition shows some ominous signs of rather complacent editorship. Law booksellers' catalogues are studded with old-established works which have sunk through successive editions to a condition so moribund that no editorship, however painstaking, can now save them from limbo. If this is not to happen to *Harris*, the next edition should be the occasion of a drastic overhaul.

There is not space to mention all the matters to which the attention of the editors should be drawn, and indeed mention of them all would make extremely tedious reading. It will suffice to make a selection, grouped under various headings.

Omissions—Ferguson v. *Weaving* on aiding and abetting; *N. C. B.* v. *Gamble* on accessories; *James & Son* v. *Smee* on "causing" or "permitting"; *Franklin* on manslaughter by unlawful act (it is not made clear in the text that the unlawful act must be a dangerous one); *Davenport* on embezzlement; *Clucas* on obtaining; *Kingdon* on continuing trespass; *Hobson* v. *Impett* on receiving; *Hopkins & Collins* on "false document" in forgery (a case which throws doubt on the utility of the discussion on pp. 357–360 of forgery at common law); *Bassey* on "intent to defraud" in forgery (and also Lord Tucker's observations in *B. O. T.* v. *Owen* which have since been confirmed by the House of Lords in *Welham*).

Useless Cases—*Lomas* on accessories before the fact (a footnote refers to *Bullock* and *Bainbridge*, which shew that the rule for which *Lomas* is cited in the text no longer exists. A better reference would have been to *N. C. B.* v. *Gamble* which is not cited in this context).

Osborne v. *Barton* is no authority on the meaning of obtaining credit, since *Ingram*.

Richards (1911) on continuing trespass in larceny.

Obscurities and Infelicities—The definition of Murder (p. 219): "Homicide is the killing of a human being by a human being. Unless justifiable or excusable it is a felony which if committed with malice aforethought, is, except in cases of infanticide, murder, and which is punishable in six cases only (and not then if the offender is a pregnant woman or is under eighteen years of age) by death and in all other cases by imprisonment for life." The definition of malice aforethought appears on p. 228, and has no reference to *Vickers*, which is only cited (on p. 230) for the proposition, "But he is not guilty merely because the act was done in the cause or furtherance of some other offence without malice aforethought."

Causation in Homicide (p. 222): ". . . if A inflicts on B a bodily injury which is the originating cause of a series of consequences resulting in death, it is no defence that the final cause was . . . an operation . . . performed under competant advice." This is true as far as it goes, but among the authorities quoted for it is *Jordan*, and that is the only mention of that case, so far as it concerned substantive law. The only case mentioned as an example of a break in the chain of causation is *Martin*, the case of the gin-tippling baby.

Maliciously killing cattle, etc. (p. 354): "The existence of malice may be negatived by proof that what was done by the defendant was done in the bona fide belief that it was necessary for the protection of his own or his master's property." A footnote adds "see also (*inter alia*) *Gott* v. *Measures*." In view of the decision in that case, "see also" can only be described as inadequate.

Definition of *animus furandi*. The meaning given to "fraudulently" by *Williams* (1953) is surely worth more than a footnote. The explanation might be that it appeared too late to go in the text of the 1954 edition, and as a result of hasty editing, has remained a footnote in the 1960 edition. Hasty editing seems responsible also for the unsatisfactory treatment of the functions of judge and jury in murder cases where provocation is raised. In spite of section 3 of the Homicide Act, 1957, the relevant paragraph in the nineteenth edition is repeated word for word in the twentieth. Lord Simon's dictum in *Holmes* v. *D. P. P.* on words as provocation, continues to be quoted, followed by an obviously tacked-on reference to section 3. There is no mention of any post-Act case on verbal provocation (*e.g.*, *Simpson* and *Fantle*).

Mention must also be made of the short and obscure section on Attempts. *Misplacings*: What is the paragraph setting out the facts and decisions of *Hudson* (p. 290) doing in the section devoted to explaining that pecuniary benefit is not a requirement in larceny?; *Hudson* is a decision on the time of criminal intent in larceny. (Incidently, the paragraph commences with the inappropriate, but almost inevitable " So, also . . .".)

If obtaining credit by fraud must go in the Chapter concerned with Offences against Public Trade, there ought at least to be adequate cross-references to and in the section on obtaining by false pretences.

" Offences against Public Trade " seems a curious home for " Oil in Navigable Waters," which might be better discussed along with Public Nuisance.

Oil in Navigable Waters leads us naturally on to our last class of things to be touched on, which might be headed *Useless Material*: What class of reader will require to know (and will consult *Harris* to find out) that it is an offence, punishable on indictment by a fine of £5,000, to fail to give notice, on entering a harbour, that a ship is carrying petroleum spirit? Surely not students; nor policemen, who, in the unlikely event of the point arising, would consult more professional tracts such as *Archbold* or *Stone*. Harbour-masters, perhaps—a limited class—who would undoubtedly have small use for the seven and a half pages on lotteries ,and the fourteen pages on gaming and wagering. One approaches this subject with caution, since *Harris* has always prided itself on compendiousness, and has never apparently minded reading like a seedsman's catalogue. The fact remains, however, that compendiousness without absolute completeness is no real use to anyone. Perhaps certain policemen might find the tight-packed section on lotteries and gaming useful, but what use could they have for information about Motions to Quash? Who but counsel or bar students would ever need that learning, and would counsel dare to neglect *Archbold* on the topic? A bar student might be satisfied with *Harris's* account of this subject, but one sees him yawning over " Oil in Navigable Waters," which is not likely to be the subject of a question in the bar final.

The impossible nature of the Protean task which *Harris* has set out for itself is seen most clearly in the enormous chapter on Matters in Respect of which Summary Jurisdiction exists. Section 1, on offences, has a catalogue of offences, briefly dealt with, which starts with Advertisements and works through the alphabet to Weights and Measures. But the chapter begins with an admission that it is impossible to deal with every matter and those which are dealt with are only a selection. What is the use of a selection? Nothing smaller than *Stone* is of any use to anyone engaged in practice before Magistrates' Courts, and no one else is compelled to master even a selection of matters over which the justices have jurisdiction.

Once admit that it is impossible for a book of *Harris's* size to be all things to all men, and we need not concern ourselves with such rarely-met-with characters as circularising moneylenders, neglectful pilots, insubordinate apprentices, drunken old age pensioners and unregistered theatrical employers. It becomes possible to jettison the (necessarily incomplete) list of statutory powers of arrest without warrant, the catalogue of things it is an offence maliciously to damage (articles of silk, wool, linen, cotton, hair, mohair, alpaca, etc., hopbinds, trees, shrubs, airshafts in mines, sea and river banks, floodgates on fish ponds, bridges, viaducts, railway carriages, telegraphic batteries, machinery, wires and posts, navigation buoys, parts of vessels, etc., etc., *ad infinitum*) and a host of other *minutiae*.

At present *Harris* consists of two classes of matters; the dull and useless but accurate catalogues, and the interesting and useful but inaccurate discussions of major crimes and general principles. Cutting down or abolishing the former class and expanding and correcting the latter would, it is seriously suggested, make *Harris* a slimmer but immeasurably more readable and useful work.

D. W. ELLIOTT.

Readers' digest:

Homicide: Natural and Probable Consequences, *D. P. P.* v. *Smith*: 124 *Justice of the Peace* 588.

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Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review*, 11 *New Fetter Lane, E.C.*4. *Every effort will be made to return drafts or unsuitable copy, but no guaranteee can be given in this respect.*

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THE
CRIMINAL LAW
REVIEW

November 1960

Murder controversy

We include in this issue a short report of *D.P.P.* v. *Smith* together with a full commentary by Professor J. C. Smith criticising the decision. On page 728, in a full and detailed article, Dr. Rupert Cross also condemns the decision, thus adding two more voices to those which have been raised elsewhere.

The practical application of the rule stated by the House of Lords may well cause difficulties, especially where juries differ as to the qualities of the responsible man.

With so many more urgent topics requiring the attention of the Criminal Law Revision Committee and the legislature we hesitate to suggest yet another subject for their consideration, but the whole law of Homicide will, before long, require consideration and it is to be hoped that the necessary time for this will be found.

Seven years for living on immoral earnings

Where the maximum sentence for an offence is a term of imprisonment for several years, imposition of that maximum sentence is fairly rare. Where it occurs it will normally be the climax, as it were, of a criminal career of some length and substance. The recent case of *McKay*[1] is in this respect very striking. An application for leave to appeal against a sentence of seven years' imprisonment for living on immoral earnings was refused by the Court of Criminal Appeal. The applicant had no previous record, but the present case was " a shocking one," with elements of violence and cruelty. It is clear that part of the court's intention in approving the sentence was that its severity should have a deterrent effect on others. The maximum sentence for this offence (on conviction on indictment) was raised from two years to seven by the Street

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[1] *The Times*, October 11, 1960.

Offences Act, 1959. This may until now have appeared to those who profit from the prostitution of others to amount to an empty threat. In the matter of sentence the judicial bite does not always measure up to the legislative bark. The present Court of Criminal Appeal, not generally remarkable for indiscriminate severity, has now, if the language is permissible, bared its teeth to some purpose. It is right that the decision should be widely publicised, among those with power to sentence as among those whose activities put them in jeopardy of similar treatment. We record the decision here with that aim in mind.

" Discretion " by traffic wardens

According to the *Guardian* of October 5, there have been a number of complaints about the manner in which the traffic wardens are doing their job, and this is said to be causing bitter resentment in some quarters. It is said that " the wardens are accused of enforcing the absolute letter of the law and issuing ticket notices with apparently no regard for differing circumstances." If " discretion " in any form were to be used by the traffic wardens the result could only be farcical. Under the present system any motorist, who considers that there are mitigating circumstances in his case, is free to ignore the request for the payment of a fine and to have his case heard in a court of law. If however discretion were to be used by the wardens they would be put in a most invidious position and would be open to criticism that it had been made worth their while not to give " tickets " to motorists. Perhaps the originators of the complaints recorded in the *Guardian* could devise a scheme whereby the system could be better worked, but " discretion " surely cannot be the answer.

The reason why to be given

The practice of giving reasons for granting or refusing an application for leave to appeal has been resumed this term by the Court of Criminal Appeal. In 1952, Lord Goddard, the then Lord Chief Justice, announced ([1952] 2 T.L.R. 620) that the judges of the Court of Criminal Appeal would no longer give short judgments when refusing an application for leave to appeal. The reason for the resumption of this practice is not given but a legal correspondent of *The Times* in the issue of October 5 commented that the giving of judgments would prevent the dismay felt by visitors to the court who saw applications being dispatched in an apparently cursory manner. If this is in fact the case then the extra time taken by the already grossly overworked judges of the Queen's Bench Division will be worth while. Justice must after all be seen to be done.

Police Cadet Corps

The Metropolitan Police Cadet Training School at Hendon has made a very encouraging start, there were 1,000 applicants for the first 120 places. The boys chosen are said to provide most promising material. We hope that this most ambitious scheme will be as great a success as it deserves to be, and that it will go some way towards providing a solution to the problem of recruiting a sufficient number of police.

The Need for a Re-definition of Murder

By RUPERT CROSS, D.C.L.

"The common law does not alter. In relation to murder it has never fully accepted the doctrine of *mens rea* for it has never fully absorbed, as it has in the case of other crimes, the idea that punishment should be made to fit the wickedness of a man's mind rather than the consequences of his act."[1] These words were spoken by Sir Patrick Devlin in 1954, and they have since derived further force from the decisions in *R.* v. *Ward*[2] and *Director of Public Prosecutions* v. *Smith*.[3] So much is this the case that the time appears to have come for an urgent reconsideration of the project of a statutory definition of murder, a project favoured by Lord Goddard C.J. and Humphreys J. when giving evidence before the Royal Commission on Capital Punishment, although it was ultimately rejected by that body.[4]

R. v. Ward

Ward, a man of subnormal intelligence, suffering from stomach ulcers, was charged with the murder of a baby girl whom he had throttled after she had kept on crying while he was repairing a bed. He said that he completely lost his temper and had no intention of killing or hurting the child in any way, there being no other thought in his mind except that of quietening her. Ward was nevertheless convicted of murder after a summing-up which contained the following passage to which the jury evidently attached a great deal of importance because they asked the judge a question about it in the course of their deliberations, and the judge repeated it to them: "If, when he did the act which he did do, he must as a reasonable man have contemplated that death or grievous bodily harm was likely to result to that child as a result of what he did, then, . . . if you are satisfied about that, he is guilty of murder." This passage was approved by the Court of Criminal Appeal when affirming Ward's conviction. The judgment of the court was delivered by Lord Goddard C.J., who said: "Of course the test must be applied to all alike, and the only measure that can be brought to bear on these matters is what a reasonable man would or would not contemplate. If the act is one as to which the jury can find that a reasonable man would say 'it would never occur to me that death would result or grievous bodily harm would result' then the jury can find him guilty of manslaughter; but if the jury come to the conclusion that any reasonable person, that is to say, a person who cannot set up a plea of insanity, must have known that what he was doing would cause at least grievous bodily harm and death is the result of that grievous bodily harm, then that amounts to murder in law and a verdict of murder is justified." [5]

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[1] From a lecture by Sir Patrick Devlin [1954] Crim.L.R. 661, at p. 663.

[2] [1956] 1 Q.B. 351.

[3] [1960] 3 W.L.R. 546.

[4] Cmd. 8932 (1949–53), paras. 462–483. Lord Goddard C.J., with whom Humphreys J. ultimately agreed, favoured re-definition on the lines of s. 174 of the Draft Code of 1878. The adoption of s. 174 just as it stands would not meet all the suggestions made in this article, but these suggestions would be met by the omission of the words "ought to know" from s. 174 (*d*), or, if a more drastic reform is required, by omitting clause (*d*) altogether. It is not the drafting so much as the content of proposed statutory definitions of murder that gives rise to dispute. Accordingly no reference is made in this article to the various draft re-definitions which have been suggested.

R. v. *Ward* met with an understandably poor reception from academic writers, but no one was able to dispute Lord Goddard's statement that the summing-up was one which had been given in scores of cases. There was, however, one small ray of hope for those who think that a man should only be convicted of murder if he actually foresaw that the act of his which killed the deceased would probably cause death or grievous bodily harm. It was just arguable that a summing-up of the kind approved in *R.* v. *Ward* should be treated as a direction with regard to the evidence in the particular case. On this view, the final question to be decided by the jury at every murder trial concerns the accused's actual foresight of the consequences of his act, although there are certain situations in which it is proper for a judge to direct the jury that the evidence against the accused is so strong that he must be taken to have realised that his conduct would certainly cause death or grievous bodily harm whatever he may say to the contrary. This was the interpretation of *R.* v. *Ward* adopted by the Court of Criminal Appeal in *R.* v. *Smith*,[6] but it was decisively rejected by the House of Lords in the same case. It is therefore settled law that a person may sometimes be guilty of murder although, at the time when he performed the act which caused death, he did not contemplate that it would have this effect or even that it would cause grievous bodily harm.

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[5] [1956] 1 Q.B. at p. 356. Ward was reprieved.

[6] [1960] 3 W.L.R. 92.

Director of Public Prosecutions v. Smith

Smith was charged with the capital murder of Police-constable Mehan. A car driven by Smith and containing stolen goods had been stopped by an officer on point duty when Mehan questioned Smith about its contents and requested him to draw into the kerb. Instead of doing so, Smith drove away at an increasing speed and on an erratic course with Mehan clinging to the car. Mehan was thrown off Smith's car and killed by being run over by another car. It was not suggested that Smith intended to kill Mehan, and it was possible that he was in such a state of panic that he did not even consider the possibility of causing him grievous bodily harm. Smith was nevertheless convicted of capital murder after a summing-up modelled on that in *R.* v. *Ward*: "If you are satisfied that . . . he must as a reasonable man have contemplated that grievous bodily harm was likely to result to that officer . . . and that such harm did happen and the officer died in consequence then the accused is guilty of capital murder." Smith appealed to the Court of Criminal Appeal who substituted a conviction for manslaughter, but the Director of Public Prosecutions successfully appealed to the House of Lords where the passage quoted from the summing-up was approved. All the members of the House concurred in the Lord Chancellor's speech of which the following is probably the most crucial passage: "The jury must of course in such a case as the present make up their minds on the evidence whether the accused was unlawfully and voluntarily doing something to someone. The unlawful and voluntary act must clearly be aimed at someone in order to eliminate cases of negligence or of careless or dangerous driving. Once, however, the jury are satisfied as to that it matters not what the accused in fact contemplated as the probable result or whether he ever contemplated at all, provided he is in law responsible and accountable for his actions, that is, was a man capable of forming an intent, not insane within the M'Naghten Rules, and not suffering from diminished responsibility. On the assumption that he is so accountable for his actions, the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result. The only test available for this is what the ordinary responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result. That, indeed, has always been the law, and I would only make a few citations." [7]

The statement that that has always been the law was amply justified by the authorities on the law of murder, but it is regrettable that the House of Lords did not recognise the need for a parliamentary reconsideration of this subject in the light of developments with regard to other crimes and changes in the rules of evidence, even if the House felt unable to uphold the Court of Criminal Appeal's attempt to explain away *R.* v. *Ward* in terms of the type of direction which a judge may sometimes be warranted in giving to a jury with regard to the evidence in a particular case.[8] The accused's liability for a number of crimes is determined by his actual foresight of the consequences of his conduct. If there is no reason other than authority why murder should be different, the matter is surely one for judicial regrets in the highest court in the land. If, apart from authority, there is a good reason for the distinction, it should be stated with the utmost clarity and this was not done by the House of Lords in *Smith's* case. So far as the rules of evidence are concerned, it is only since 1898 that someone accused of murder has been able to give the court his version of his state of mind at the material time. When this was not possible, it was almost invariably necessary to instruct juries to determine the accused's state of mind with regard to the consequences of his conduct in terms of that which the ordinary man would have foreseen in the circumstances of the case. It could seldom, if ever, have made much difference in a murder case whether such a direction was regarded as one concerning the manner in which the evidence should be treated or whether it was deemed to lay down a rule of substantive law to the effect that the accused is guilty of murder if, with knowledge of the relevant circumstances, he caused death by an act which an ordinary man would realise was likely to have this effect, or likely at least to have the effect of causing grievous bodily harm. The distinction between the two interpretations is crucial now that the accused can, and usually does, give evidence on his own behalf. There is, of course, a risk that the jury will attach too much weight to the accused's testimony concerning his state of mind on a past occasion, but that is no reason for directing them to ignore it altogether at a trial for murder. Yet this appears to be the effect of a ruling that, once the jury in a murder case are satisfied that the accused was unlawfully and voluntarily doing something to someone, it matters not what he in fact contemplated as the probable result.[9]

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[7] [1960] 3 W.L.R. at p. 554. Smith was reprieved.

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[8] There was a more elaborate argument and citation of authorities before the House of Lords than there was before the Court of Criminal Appeal. No past decision of the House can be said to have bound it to decide as it did, for the remarks cited from *Beard's Case* [1920] A.C. 479 must probably be treated as dicta, but, more especially in a criminal case, it is difficult for the House of Lords to go against a strong current of authority in lower courts.

Some of the other implications of the Lord Chancellor's speech in *Director of Public Prosecutions* v. *Smith* will be briefly considered under the heads of the *ratio decidendi* of the case, the meaning of "grievous bodily harm," the reasonable man in the law of murder, the presumption of intention in the law of murder and murder as contrasted with other crimes. It will be convenient first to say something about malice aforethought, even at the risk of expatiating on the commonplace, because malice aforethought must be the focal point of any discussion concerning the need for a re-definition of murder.

Malice aforethought

One great advantage of re-defining murder would be the total elimination of the phrase "malice aforethought," a phrase which, according to Sir James Stephen, "is never used except to mislead or to be explained away." [10] As every lawyer knows, a person may be guilty of murder although he bears no malice and acts without premeditation. So far as the present law is concerned, the Royal Commission on Capital Punishment relied on the definition of malice aforethought contained in Stephen's *Digest of the Criminal Law*. Omitting the portions which have been rendered obsolete by the Homicide Act, 1957, this definition reads: "Malice aforethought means any one or more of the following states of mind preceding or co-existing with the act or omission by which death is caused and it may exist where that act is unpremeditated. (a) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not; (b) knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused." [11] If we ignore the now obsolete rules that it was murder to cause death in furtherance of a felony or in resisting or escaping from arrest, the Commission considered what they believed to be the current law of murder to be perfectly satisfactory: "Some authorities have indeed held that it is not necessary that the accused should actually have foreseen the consequences if he was aware of circumstances that, according to common experience, would make the commission of the act likely to involve great danger. We do not share this view, but in practice the difference between the subjective and objective test will be much less than would appear in theory. The jury will generally have to infer that the prisoner knew that his act was dangerous from the fact that its danger was obvious and would have been plain to any reasonable man, although he may sometimes be able to satisfy them that the inference should not be drawn. Under the existing law, as stated by Stephen, the question the jury have to consider in such a case is whether the accused knew or was aware of the likely consequences of his act; we think the present law is sound." [12] *Director of Public Prosecutions* v. *Smith* shows conclusively that the Commission was mistaken with regard to the existing law, and it is difficult to escape the conclusion that they would have recommended a change had they appreciated that Stephen's definition of malice aforethought was incomplete. The precise form of words required to complete Stephen's definition is even now uncertain owing to the necessarily restricted nature of the *ratio decidendi* of *Smith's* case. Whatever view may be entertained with regard to the merits of our law of murder, it is difficult to believe that the most fervent advocate of case-law cannot have some sympathy with those who maintain that it is little short of a scandal that the precise terms of the definition of a capital crime should still be a matter of dispute.

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[9] When speaking, in *Smith's* case, of the Court of Criminal Appeal's conclusion that the question was whether the appellant really did realise what was the degree of likelihood of serious injury, Lord Kilmuir said: "This purely subjective approach involves this: that if an accused said that he did not in fact think of the consequences, and the jury considered that it might well be true, he would be entitled to be acquitted of murder" (at p. 553). Many people would say that it is perfectly proper that the accused should be acquitted of murder and subjected to the law of manslaughter in such a situation. If the danger is that juries may be too prone to believe the accused in capital cases, the remedy is to abolish capital punishment or, if capital punishment is to be retained, to abolish trial by jury in murder cases.

[10] *History of Criminal Law*, Vol. 3, p. 83.

The ratio decidendi of Director of Public Prosecutions v. Smith

Acting on the suggestion of the trial judge, the jury in *Smith's* case must be taken to have rejected parts of the accused's testimony in which he said that he accelerated involuntarily and did not know that Mehan was still holding on to the car. For the purposes of ascertaining the *ratio decidendi* of the case, Smith must therefore be taken to have been consciously endeavouring to shake Mehan off the car in the midst of traffic, although he may not have intended or foreseen that any serious bodily harm would result. As Mehan was acting in the execution of his duties, Smith's act was in the nature of an unjustified assault. It is submitted that it would be unwise to hold that the principle of the case necessarily extends beyond such facts. On this view the *ratio* is that, granted that the accused is voluntarily and unlawfully performing an act in the nature of an assault against someone, and assuming that he is "in law responsible and accountable for his actions," he is guilty of murder if the act was of such a kind that an ordinary responsible man would have contemplated death or grievous bodily harm as its probable result. "An intention to do an act in the nature of an assault of which a likely result will be death or grievous bodily harm, although such result may be wholly unforeseen by the accused," or some such words, should therefore be added to Stephen's definition of malice aforethought if it is to be made to represent the present law.

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[11] 9th ed., art. 264.

[12] Cmd. 8932, para. 473. Some of the illustrations in the *Digest* show that Stephen recognised that the test of liability might be objective, but the summing-up of Cockburn C.J. in *R.* v. *Desmond, Barrett and Others* (illustration 8) favours a subjective approach.

This is the very least that should be done. It may be the law that the accused is guilty of murder if he does *any* unlawful act with knowledge of circumstances from which an ordinary man would infer that death or grievous bodily harm would result although he (the accused) does not draw this inference. An example is provided by the following quotation from Holmes' *Common Law*: "If a workman on a house-top at midday knows that the space below him is a street in a great city, he knows facts from which a man of common understanding would infer that there were people passing below. He is therefore bound to draw that inference, or, in other words, is chargeable with knowledge of that fact also, whether he draws the inference or not. If then, he throws down a heavy beam into the street, he does an act which a person of ordinary prudence would foresee is likely to cause death, or grievous bodily harm, and he is dealt with as if he foresaw it, whether he does so in fact or not. If a death is caused by the act, he is guilty of murder."[13] Can this really be the modern law? If, in a fit of temper, A seizes B's box from the end of a pier off which a large number of people are bathing and casts it into the sea, A may well be guilty of larceny of the box. Is he also guilty of capital murder committed in the course or furtherance of theft if a bather is struck and killed by the box? If the box were big enough and the number of bathers sufficiently great, an ordinary reasonable man might well infer that there was a serious probability that death or grievious bodily harm would result from A's act, although A was so obsessed with the idea of depriving B of his box that he could think of nothing else.[14] One cannot say that a judge would be bound by the *ratio decidendi* of *Smith's* case to direct a jury that A would be guilty of murder if they were satisfied that, when he threw the box out to sea, he must, as a reasonable man, have contemplated death or grievous bodily harm as a likely result of his act. Nevertheless, the first of the Lord Chancellor's citations in *Smith's* case was a passage from Holmes' *Common Law* which is nothing more than a generalisation from the example already quoted of the workman on the roof. This gives rise to serious doubts whether the House of Lords might not hold both A and the workman guilty of murder although neither of them contemplated either death or grievous bodily harm as a likely result of their conduct.

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[13] p. 55. The illustration goes back to the seventeenth century.

If it is malice aforethought to form an intention to do any unlawful act, as opposed to an unlawful act in the nature of an assault, which an ordinary responsible man would realise was likely to result in death or grievous bodily harm, even if such a result was not foreseen by the accused, it becomes difficult, if not impossible, to distinguish a serious case of motor-manslaughter from murder. Knowing that a street in a built-up area is full of children, a motorist intentionally exceeds the speed limit. Provided his speed is sufficiently excessive, he might well be held to be doing an unlawful and voluntary act of such a kind that an ordinary man would contemplate death or grievous bodily harm as its probable result, but he might never have contemplated such a possibility. Is he guilty of murder if one of the children is killed? Writing before the age of motor-cars, Holmes thought that perhaps a case could be put where the "riding was so manifestly dangerous that it would be murder." [15] On the other hand Lord Kilmuir was, as we have seen, anxious, in *Smith's* case, to eliminate cases of negligence and dangerous driving from the sphere of murder by requiring that the unlawful and voluntary act should be "aimed at someone." The principal reason why the Royal Commission on Capital Punishment was opposed to a statutory re-definition of murder was that it would render it more difficult to prosecute for manslaughter in motoring cases which technically come within the proposed definition. Writing before the creation of the offence of causing death by dangerous driving, the Commission doubted the possibility of framing a statutory distinction between those classes of acts likely to cause death or serious injury currently prosecuted as murder, and currently prosecuted as manslaughter.[16]

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[14] The example is modelled on *R.* v. *Franklin* (1883) 15 Cox 163 where the accused was convicted of manslaughter by criminal negligence. The most exceptional circumstances would of course be required to make the case one of murder within the doctrine under consideration.

[15] *Common Law*, p. 60.

The meaning of "grievous bodily harm"

The Commission expressed the belief that few people would dispute the propriety of making the definition of murder wide enough to include cases where death is caused by an act intended to do serious bodily injury.[17] This belief has not gone unchallenged,[18] but the doctrine may be acceptable to many provided the law requires what the Commission said it should require, namely, that the injury should be inflicted with the intention to kill or endanger life, or with knowledge that it would be likely to have one of these effects. While recognising that the phrase "grievous bodily harm" has not always been thus restrictively interpreted, the Commission thought that progress in the desired direction might be left to the courts and to the development of the common law. They also recorded the impression that the practice of the courts was moving in the desired direction and that, except in certain cases of killing while committing a felony or resisting arrest, a person would seldom if ever be convicted of murder unless there was evidence that he had wilfully put life in danger.[19] *Smith's* case shows that the Commission was over-optimistic both as to the existing law and as to future developments. The question whether the accused wilfully endangered life was, in effect, withdrawn from the jury, and, although the Lord Chancellor's speech stresses the necessity of giving the expression "grievous bodily harm" its natural meaning of "really serious harm," as distinct from "any serious interference with the victim's health or comfort" which figured in earlier summings-up, it expressly disapproved of any such qualification of the phrase as that the harm should be dangerous to life.[20] It seems, therefore, that, if an escaping criminal shoots at a policeman's legs in order to disable the officer without endangering life, he runs a grave risk of a conviction for capital murder if death ensues. To say the least, it is arguable that to shoot bullets into a man's legs in order to immobilise him is to cause really serious bodily harm.

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[16] Cmd. 8932, para. 479. The doubt may well be justified, but it is beside the point if the distinction between murder and manslaughter be made to turn on the actual state of mind of the accused.

[17] *Ibid.*, para. 472.

[18] See the lecture by Sir Patrick Devlin [1954] Crim.L.R. at p. 668.

[19] The excepted cases have been rendered obsolete by the Homicide Act, 1957.

[20] [1960] 3 W.L.R. at p. 560. The House of Lords has confirmed the decision in *R.* v. *Vickers* [1957] 2 Q.B. 664 in so far as that case decides that the doctrine, that it is malice aforethought to intend to cause grievous bodily harm, is unaffected by the Homicide Act, 1957. Opponents of capital punishment can now point to the fact that Vickers, who was hanged, was convicted after a summing-up containing a definition of grievous bodily harm in terms of interference with health or comfort which the House of Lords has since held to be too broad.

The reasonable man in the law of murder

In the course of his speech in *Smith's* case Lord Kilmuir said: "My only doubt concerns the use of the expression 'a reasonable man' since this to a lawyer connotes the man on the Clapham omnibus by reference to whom a standard of care in civil cases is ascertained. In judging of intent, however, it really denotes an ordinary man capable of reasoning who is responsible and accountable for his actions, and this would be the sense in which it would be understood by a jury."[21] Although the phrase "a reasonable man" is said, in this context, to be used in judging of intent, the doctrine of *Smith's* case is that liability for murder is sometimes partially based on negligence. The accused is liable because he negligently failed to draw an inference as to the consequences of his intentional act which ought to have been drawn by any ordinary man capable of reasoning. This introduction of negligence into the law of murder may yet lead to legal difficulties, even if it has been part of the law for a considerable time.[22] What is much more important, it certainly tends to rob the distinction between murder and manslaughter of all moral significance. A quarrels with his wife and knocks her down so that she fractures her skull and dies in consequence. A is guilty of manslaughter, unless he intended to kill his wife or cause her grievous bodily harm. Instead of knocking her down, A seizes his wife by the throat and throttles her. A is guilty of murder although the jury find that he was prevented by rage from realising the consequences of his act.[23] Assuming that Holmes' example of the workman on the roof is still law, we have the following motley assortment of cases of murder if the workman kills someone by throwing a large beam into a crowded street: (1) he knows that it is daytime and that the street is usually crowded but does not look on the occasion in question; (2) he knows that the street is in fact crowded but, in the heat of the moment, does not advert to the consequences of his act; (3) he realises that it is likely that the beam will kill someone; (4) he throws the beam in order that it should kill someone. The common basic reason why the workman should be punished in these cases is that he could have chosen to do otherwise. In cases (1) and (2) he could have looked or paused to think, in cases (3) and (4) he could have desisted from throwing the beam. If a more determinist view be thought desirable, punishing the workman may, in the future, induce him, or others, to act differently in a parallel situation. But there is no need to labour the point that the degree of blameworthiness is infinitely greater in cases (3) and (4) than in the others. Some would maintain that there is a sufficiently clear moral distinction between cases (3) and (4) to be recognised by the law, while others would maintain that someone who does an act knowing that a particular consequence is likely to follow must, for legal purposes, usually be treated as though he had done the act in order to produce that consequence.[24] There is room for a legitimate difference of opinion here, but there is no room for such a difference when cases (1) and (2) are contrasted with cases (3) and (4). If the law is that they are all cases of murder, the law is absurd.

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[21] [1960] 3 W.L.R. at p. 557.

[22] Difficulty may be occasioned by the use of the phrase "reasonable man" in the context of provocation and by the requirement of reasonableness in the case of mistake.

[23] *R.* v. *Philpot* (1912) 7 Cr.App.R. 140.

The presumption of intention in the law of murder

When *Smith's* case was before the Court of Criminal Appeal, great stress was placed, in quashing the conviction for murder, on the rebuttable nature of the presumption that a man intends the natural consequences of his acts. Reference was made to a statement of Lord Goddard C.J. in *R.* v. *Steane* [25] where a conviction for doing acts likely to assist the enemy with intent to assist the enemy was quashed. In the House of Lords, the Lord Chancellor distinguished *Steane's* case as one in which "over and above the presumed intent, there had to be proved an actual intent or, it might be said, a desire by the appellant to assist the enemy." "No such overall intent or desire is involved in the consideration of intent to kill or to do grievous bodily harm. Thus an overall intent or desire, for example, an intent or desire to escape, could not afford any defence." [26] A clear distinction must therefore be drawn between cases of murder and cases in which it is necessary for the prosecution to prove what is sometimes called a "specific intent." When a specific intent is required, proof that the accused did acts likely to produce the prohibited result does not establish his guilt as a matter of substantive law, although it may provide cogent evidence that he acted with the overall intent of producing the prohibited result. In a murder case, on the other hand, it is now clear that, as a matter of substantive law, someone who intentionally does an act in the nature of an assault which is in fact likely to kill or cause grievous bodily harm is, although he did not contemplate these results, treated in exactly the same way as someone who acted in order to achieve them. If the accused's contemplation of the consequences is legally irrelevant, it follows that, in murder cases such as *Director of Public Prosecutions* v. *Smith*, it is unnecessary to refer to the presumption that a man intends the natural consequences of his acts, and this point was stressed by the Lord Chancellor. If, in such cases, the accused's act was not rendered unintentional by accident or mistake, the only available defences would be insanity, diminished responsibility or something, such as tender years or advanced intoxication, recognised by the law as incapacitating the accused from forming an intent to cause death or grievous bodily harm to anyone at the material time. Accordingly, if the presumption of intention is applied, "once the accused's knowledge of the circumstances and the nature of his acts have been ascertained, the only thing that could rebut the presumption would be proof of incapacity to form an intent, insanity or diminished responsibility." [27] In cases in which a specific intent is required, the presumption may be rebutted in many other ways. For example, on a charge of shooting with intent to murder it may be shown that, although the accused intentionally inflicted serious wounds, his overall intention was to resist arrest.[28]

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[24] Sometimes the word "certain" is substituted for "likely," but, in *Smith's* case, the Lord Chancellor said there is no warrant for the distinction in a summing-up (at p. 559).

[25] [1947] K.B. 997.

[26] [1960] 3 W.L.R. at p. 558. Failure to realise the special nature of *Steane's* case led the High Court of Australia to treat *R.* v. *Ward* as inconsistent with that decision in *Smyth* v. *The Queen* (1957) 98 C.L.R. 163.

Murder and other crimes

The difference between murder and crimes in which a specific intent must be proved is no doubt due to the interpretation of the words "with intent to" occurring in the definitions of these crimes, words which are less amenable to constructions of the kind that have, throughout the last four centuries, been given to "malice aforethought." These constructions were sedulously avoided by the English courts when the word "maliciously," used in the definition of a number of statutory crimes, came to be interpreted by them.[29] The effect of the English cases on this subject was concisely stated by the Court of Criminal Appeal as recently as

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[27] [1960] 3 W.L.R. at p. 557. The conception of incapacity to form an intent in this context may require further investigation.

[28] *R.* v. *Steane* [1947] K.B. 997, at p. 1004. The phrase "specific intent" is used in different senses and requires further investigation.

[29] See the judgments of Coleridge and Blackburn JJ. in *R.* v. *Pembliton* (1874) 2 C.C.R. 119.

1957 in *R.* v. *Cunningham*[30]: "In our opinion the word 'maliciously' in a statutory crime postulates foresight of consequence." *R.* v. *Cunningham* and several other English cases on the interpretation of the statutory word "maliciously" were cited in argument in *Director of Public Prosecutions* v. *Smith* but no reference was made to them by the Lord Chancellor in his speech. He quoted instead the following words of Palles C.B. in the Irish case of *R.* v. *Faulkner*[31]: "In my judgment the law imputes to a person who wilfully commits a criminal act an intention to do everything which is the probable consequence of the act constituting the *corpus delicti* which actually ensued. In my opinion that inference arises irrespective of the particular consequence which ensued being or not being foreseen by the criminal, and whether his conduct is reckless or the reverse. This much I have deemed it right to say to prevent misconception as to the grounds upon which my opinion is based." Faulkner was convicted of maliciously burning a ship, contrary to section 42 of the Malicious Damage Act, 1861, when he set fire to the ship in the course of stealing rum. His conviction was quashed by the majority of the Irish Court for Crown Cases Reserved (1) because there was no finding that he had foreseen that the ship would catch fire, and (2) because the burning of the ship was not a natural consequence of lighting a match while stealing rum. Palles C.B.'s opinion in favour of quashing the conviction was based entirely on the second ground. The passage quoted is, of course, inconsistent with the view that, in a statutory crime, "maliciously" postulates foresight of consequence, but it is scarcely conceivable that the Lord Chancellor intended to cast doubt on the view taken in English cases later than *R.* v. *Faulkner* without even referring to them. Accordingly, if Mehan had not been killed, and if Smith had been convicted of unlawfully and maliciously causing grievous bodily harm to Mehan with intent to do grievous bodily harm contrary to section 18 of the Offences Against the Person Act, 1861, or of unlawfully and maliciously inflicting grievous bodily harm on Mehan contrary to section 20, it seems that his conviction would have been quashed if words similar to those quoted from the summing-up in *Director of Public Prosecutions* v. *Smith* had been used. Smith's conviction for murder was upheld. Was Smith's moral blameworthiness in any way enhanced by the fact that Mehan was killed?[32] Could there be a more striking illustration of the truth of the words quoted at the beginning of this article?

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[30] [1957] 2 Q.B. 396, at p. 400.

[31] (1877) 13 Cox 550, at p. 561. In both the *All England Reports* and the *Weekly Law Reports* Faulkner's conviction is erroneously stated to have been upheld.

[32] It is true that, where two accused have identical states of mind, the fact that one caused more harm than the other, may justify the infliction of a

Conclusion

If, treason apart, murder is deservedly to be regarded as the most serious offence in the criminal calendar, it is submitted that there are three respects in which the current definition is in need of amendment. First, it should be made plain that the accused is only guilty of murder if he meant to kill someone, or actually foresaw death or grievous bodily harm as a likely consequence of his conduct, secondly, " grievous bodily harm " should be defined as " bodily harm endangering life " and thirdly it should be made plain that the unfortunate person who kills another while endeavouring to commit suicide is not guilty of murder.[33] This last point is a small one, but if it really is the law that murder is committed on such facts, there is at least one respect in which few would deny that the current definition is utterly out of touch with contemporary morals. So far as the first submission is concerned, there is room for argument that the definition should be confined to cases in which the accused meant to kill or endanger the life of another person, but this is not the place in which to pursue the matter. The point is that *Smith's* case has shown that it is impossible to hope for further development of this part of the law by the judges and that the Royal Commission's recommendation against a complete statutory re-definition of murder was based on serious misapprehensions. The history of the endeavours made during the past hundred years to formulate an acceptable definition of murder is hardly calculated to give rise to optimism, but that is no reason why the Criminal Law Revision Committee should not be given an opportunity to make yet one more attempt.

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greater degree of punishment because public opinion has to be considered, but the distinction to which attention is drawn in the text is too glaring to be justified on this ground.

[33] See *R.* v. *Spence* (1957) 41 Cr.App.R. 80.

Second United Nations Congress on the Prevention of Crime and the Treatment of the Offender

Report by JEAN GRAHAM HALL, LL.M.

Two weeks of attending the Congress and meeting many of the 900 criminologists, police and prison officials, lawyers and sociologists gave one an impression of the world coverage of the problem, eighty-four nations were represented, and of the remarkable breadth of outlook and depth of tact of the United Nations Secretariat. Although lectures were delivered by a number of eminent practitioners, the value of the Congress seemed to lie in the sectional discussions, where the speeches were short and to the point.

New forms of juvenile delinquency

Repetition of a familiar tale from delegates of countries with a diversity of tradition, development and social structure resulted in the recommendation that the scope of the problem of juvenile delinquency should not be unnecessarily inflated. The Congress held that (a) the meaning of the term juvenile delinquency should be restricted as far as possible to violations of the criminal law and (b) specific offences, which would penalise small irregularities or maladjusted behaviour of minors and offer opportunities of protection to them (but for which adults would not be prosecuted) should not be created.

This is a great step from the prevailing view of the past fifteen years when recorded increases in juvenile delinquency have been due partly to the fact that large numbers of cases are brought because of better organisation of prevention and treatment. Further, certain countries include in delinquency a series of minor acts of indiscipline or social maladjustment.

More new forms of juvenile delinquency have emerged and increased in certain countries which have higher standards of living and more developed welfare, mental and health services than have occurred in countries that are less advanced in these respects. New manifestations of juvenile delinquency—the importance of which is liable to be greatly exaggerated—take characteristic forms such as gang activities, vandalism, joy-riding and traffic offences. These can be disturbing from the point of view of public order, without necessarily being an indication of serious anti-social behaviour.

The Congress recommended that in these fields, the efforts of official or semi-official agencies should be more widely employed; and that the emergence of "new" forms of juvenile delinquency required continuing study and the more extensive application of experimental forms of prevention and treatment.

The Congress considered that education (using the term to include both the acquisition of knowledge and the formation of character) was absolutely vital. Where a lack of adequate parental guidance or control existed, and the child's self-discipline was weak, it was agreed that intensified education, designed to bridge the gap between juveniles and adults, was needed. This would help by increasing the understanding and sympathy between them, and extending the sense of moral and social responsibility.

Films, publicity, comic books, sensational news on crime, low types of literature and television and radio programmes were listed as contributing factors to juvenile delinquency in some countries. The Congress therefore recommended that each country should take reasonable steps to prevent or reduce the effect of what was considered an abuse of mass media.

Emphasis was placed upon the apparent relationship between juvenile delinquency and the lack of working facilities or constructive occupations for young people, particularly after they had attained school leaving age.

Special police departments for the prevention of juvenile delinquency

Attaching great importance to the broadest co-operation over measures to prevent juvenile delinquency between the police, the various national specialised agencies and the general public, the Congress considered that the police, in pursuance of their general duty to prevent crime, should pay particular attention to the prevention of new forms of juvenile delinquency. They should not, however, assume specialised functions more appropriately within the field of work of social, educational and other services.

The International Criminal Police Organisation—INTERPOL—submitted a report under the title "Specialised police departments for the prevention of juvenile delinquency." This was accepted as a sound basis for such organisation. The Congress made certain reservations, however, with regard to (a) the finger-printing of young first offenders, and (b) the advisability of the setting up by the police of a system of good citizenship prizes or bad marks.

Criminality resulting from social change

The question of the types of criminality connected with social changes and accompanying economic development in less developed countries is one to which inadequate attention has hitherto been given. Therefore, the conclusions and recommendations of the Congress were declared as tentative and subject to verification based on sound research. Discussions in the section dealing with the topic were unusually interesting.

Criminality related to social changes accompanying economic development in less developed countries may not be new in the sense of forms of behaviour not previously otherwise observable.

It was agreed that migration, and especially internal migration—which is associated with social changes accompanying economic development in less developed countries—has sometimes been erroneously assumed to be a cause of criminality. It is not migration *per se* that is conducive to criminality, but perhaps the cultural instability, the weakening of primary social controls and the exposure to conflicting standards of behaviour associated with migration that are to be identified with crime causation. Thus the same conclusion can be applied to urbanisation and to industrialisation. An essential element in maintaining social integrity of the individual is the preparedness of the migrant for this experience and the preparedness of the urban community to receive him. In both instances community development, now occupying a major role in national economic and social policy in many countries, was agreed to have an important role to play.

The Congress decided that the penal code must be in harmony with and reflect social change. Individualisation of justice must be envisaged to allow rational adjudication and treatment which take into consideration both the social order and the special circumstances of the individual.

Short-term imprisonment

The Congress recognised the harmfulness of many cases of short-term imprisonment. This may expose the offender to contamination and allows little or no opportunity for constructive training. The Congress therefore regarded its wide application as undesirable, while recognising that in some cases the ends of justice may require its imposition.

In view of this fundamental situation, the Congress accepted that the total abolition of short-term imprisonment was not feasible in practice and that a realistic solution of the problem could be achieved only by a reduction of the frequency of its use in those cases where it was inappropriate; particularly where the offence was trivial or technical, or imprisonment was used in default of payment of a fine without consideration of the offender's means.

This gradual reduction, the Congress recommended, should be brought about primarily by the increased use of substitutes for short-term imprisonment, such as suspended sentences, probation fines, extra-mural labour and other measures that do not involve the deprivation of liberty. In the cases where short-term imprisonment is the only suitable disposition of the offender, sentences should be served in proper institutions with provision for segregation from long-term offenders, and treatment should be as constructive and as individualised as possible during the period of the detention. The Congress recognised the need to persuade the general public of the soundness of these views.

Pre-release treatment and after-care

Pre-release, the Congress regarded as an integral part of the process of justice and of the general training and treatment programme given to a prisoner in an institution. While general treatment programmes during any part of an institutional term should prepare the offender for return to life in freedom, certain ends can only be achieved during the last part of his imprisonment. Pre-release treatment is particularly applicable to persons serving longer terms in an institution. Attention should be given to the problems inherent in the transition to life in the community.

The purpose of after-care is to bring about the reintegration of the offender. Provision, it was decided, should be made in the first instance for his practical needs such as clothing, lodging, travel, maintenance and documents. Special attention should be given to his emotional needs and to assistance in the obtaining of employment. It is the primary responsibility of the state, as part of the rehabilitative process, to ensure the organisation of the appropriate after-care services. The usefulness of voluntary agencies was fully appreciated.

Successful rehabilitation can only be achieved with the co-operation of the public. The Congress considered that education of public opinion on the necessity for such co-operation should be fostered, and that means should be sought to obtain the co-operation of the whole community in the rehabilitative process.

Delegates strongly supported the view that it was desirable for the press to refrain from focusing attention on the released prisoner. Also, that the dependants of prisoners should not be made to suffer by reason of the offender's imprisonment.

Integration of prison labour with the national economy

The majority of the conclusions of the 1955 Congress on prison labour had not, to all intents and purposes, been applied in practice.

The present Congress reaffirmed those general principles and declared that prison labour must be regarded in the same light as the normal and regular activities of a free man. It forms an integral part of prison treatment. It must therefore be suited to the natural capacities, character and, if possible, preferences of the individual. In the case of certain categories of prisoner suffering from physical or mental handicaps, work should be regarded from a therapeutic aspect.

Methods of prison work should resemble as closely as possible those of work outside, going as far as complete assimilation or integration. To this end the Congress held that it might be desirable to set up in each country a joint co-ordinating committee consisting of representatives of the authorities of the bodies concerned with production problems, including representatives of industry and of workers.

It was held to be the duty of the Prison Administration to ensure the full employment of able-bodied prisoners. Also that prison labour should be performed in conditions similar to those of free labour, in particular with respect to equipment, hours of work and protection against accidents. Application of the social security measures in force in the country concerned must be made possible.

It was suggested that whenever practicable, prisoners should be sent to work outside the prison either for private employers or even on their own account. A system of semi-liberty or week-end detention would help to bring about this type of work. The open prison, declared the Congress, is already a forward step in this direction. Work performed within the prison system, whether organised by the Administration, by private employers or even with the participation of the prisoners, must necessarily include different types of employment corresponding to the movement of the labour market. However the work is organised, prisoners must in every case be under the sole control of the Prison Administration.

To achieve the above objectives, the Congress declared that the United Nations Secretariat should organise the exchange of information and possibly technical assistance on methods of organising prison labour in the different countries.

The payment of token remuneration to prisoners doing productive work was held incompatible with current theories on prison treatment. The payment of a minimum wage amounting, *e.g.*, to one-third of the wages of a free worker, would be a step in the right direction. The final aim should be the payment of normal remuneration equivalent to that of a free worker, provided output is the

the same both in quantity and quality. For this purpose prison work must be organised in an economic and rational way.

The payment of normal remuneration does not mean that the total remuneration is paid to the prisoner; deductions can be made by the Administration to cover part of the cost of maintenance, the indemnification of the victim, the support of the family and the constitution of a savings fund against his release. These deductions should, however, not prevent the prisoner from retaining a portion of his wages for his personal use.

Conclusion

The foregoing are the conclusions and recommendations of the Congress. Crime is international, but so is the concern for prevention and treatment. The third Congress will be held in Stockholm in 1965. We hope then to hear of the further progress from declared intentions into actualities.

Assessors in Criminal Trials in West Africa

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In West Africa,[1] trials in the Superior Courts of Record, that is to say, the High Court (or Supreme Court as it is sometimes called), are generally conducted, with a few exceptions,[2] by a judge who is assisted by two or more assessors. The practice of conducting criminal trials with assessors in Commonwealth countries originated in India and has been adopted in most other territories, especially in East and West Africa. Commenting on its origin and its purpose, Bhashyam Ayyangar J., an Indian judge, three years after the passing of the Indian Criminal Code of 1898, said, *inter alia*, in the case of *King-Emperor* v. *Tirumal Reddi*[3]:

> "The earliest Indian legislation which authorised European functionaries presiding in Courts of Session to constitute two or more respectable natives to assist them as assessors 'with a view to the advantages derivable from their observations particularly in the examination of witnesses' is Regulation VI of 1832 which was applicable only to Bengal. Act VII of 1843 extended that system to the Presidency of Madras, and it was provided by section 32 of that Act that Sessions judges may, in the trial of criminal cases, avail themselves of the assistance of respectable natives or other persons by constituting two or more such persons assessors or members of the court 'with a view to the advantages derivable from their observations, particularly in the examination of witnesses.' It was further provided that the opinion of each of the assessors

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[1] *i.e.*, the territories of Nigeria and the Cameroons, Ghana and Togoland, Sierra Leone and Gambia, where the British criminal law was introduced, and procedure in criminal trials is, with varying modifications, the same as in England.

[2] In certain parts of the territories mentioned in note 1, trials are conducted by a judge sitting with a jury. This is so generally in those areas which were originally known as "colonies" in contradistinction to "protectorates." These areas are in size and population less than one-hundredth the areas in which trial by assessors is in force.

[3] (1901) 24 Madras 523, 543.

> shall be given separately and discussed and, if so desired, recorded in writing. I may also observe that, under that Act, the opinion of assessors had a potentiality which it has ceased to have since the enactment of the Code of 1861. Thus it will be seen that provision was made by the Legislature for Europeans administering justice in a foreign land and therefore deficient in their knowledge of the customs and habits of the parties and witnesses appearing before them, and also deficient in judging of their demeanour in the witness-box, having the benefit of the opinion of two or more respectable natives of the land as assessors possessing such knowledge and judgment."

The purpose of this article is to examine the role of assessors in criminal trials in West Africa and to see what attempts have been made by the West African Court of Appeal and the Privy Council to assimilate their functions with those of a jury. It is intended to describe (a) the method by which assessors arrive at their opinions, and (b) their status at different stages in the criminal trial.

(a) The Method by which Assessors Arrive at their Opinions

It must be noted at once that the relevant provisions in the Gambia, Sierra Leone, Ghana and Nigeria provide that the judge shall summon assessors who shall assist him at the trial and whose opinions do not bind him, as the decision is vested exclusively in him.[4] As is the practice in jury trials in England, where the prisoner pleads guilty, no assessors are summoned. The prisoner is convicted on his own confession. Where the prisoner pleads " not guilty," he is deemed to have put himself on his trial. Prosecuting counsel opens the case for the Crown and calls witnesses. Examination-in-chief, cross-examination and re-examination are allowed of every witness at the trial, and the trial judge himself can examine any witness. Some judges then ask the assessors if there are any questions they would like him to put to the witness. If they so desire, he generally puts the questions himself, other judges permit direct questioning of the witnesses by the assessors. At the close of the case for the prosecution, if there is a successful submission of " no case " or " insufficient evidence," or the judge himself forms the view that the evidence is not sufficient to call upon the prisoner for a defence, he directs the assessors to give a formal opinion of not guilty and acquits and discharges the accused. The question whether an omission to give such a direction in these circumstances, vitiates the trial, will be discussed later. Some judges do not give this direction, being of the view that whether or not there is "a case to answer" is a decision of law with which assessors are not concerned.[5] Where, however, the judge is of the view that the prosecution has established a prima facie case against the prisoner, he will explain to the accused his rights of challenge, that is to say, that he can either say nothing or make a statement from the dock or give evidence on oath and/or call witnesses in support of his defence or as to character. When the accused has elected, the evidence at the trial is concluded in the rare cases except where the prosecution is allowed to call evidence in reply where a matter has arisen *ex improvisu* or the judge himself decides, in the interests of justice, to call a witness himself.

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[4] In those areas mentioned in note 2 above, where trial by assessor is an alternative, the judge is bound by the unanimous opinion of the assessors.

At this stage, in an English criminal trial, the duty of the trial judge has been summarised thus[6]:

> "After the conclusion of the evidence and arguments, the judge sums up the case to the jury. In doing so, he should direct them as to the law which is applicable, and he may and generally does go through and comment upon the evidence which has been given. He must deal with the question of burden of proof and make it quite clear to the jury that it is for the prosecution to establish the guilt of the prisoner, and if such guilt is not established, the prisoner must as of right be found not guilty: *R.* v. *Rees*[6a]; *R.* v. *Blackburn*.[6b]"

Writing on "Opinions of Assessors in Criminal Trials in East Africa as to Native Custom,"[7] Sir John Gray, a former Chief Justice of Zanzibar commented thus:

> "In trials with the aid of assessors, as in the case of trial by jury, at the conclusion of the evidence and the addresses on behalf of the prosecution and the defence, the judge may sum up to the assessors the evidence for the prosecution and the defence. In the relevant section in all four Criminal Procedure Codes the word preceding the words 'sum up' is 'may.' That is to say, there is no statutory obligation on the trial judge

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[5] It has been held that such is a decision of law—see *Abbott*, 39 Cr.App.R. 141; [1955] 3 W.L.R. 369; [1955] 2 All E.R. 899. In England, presumably, such an omission would be fatal because of the rule that a prisoner, having once been given in charge of the jury, can only be discharged by a verdict of that jury—see *Heyes*, 34 Cr.App.R. 161; [1950] 2 All E.R. 587.

[6] Archbold, *Criminal Pleading, Evidence and Practice*, 34th ed., para. 564. *N.B.*: Later references to *Archbold* are to this edition and are cited *Archbold* and the paragraph.

[6a] (1928) 21 Cr.App.R. 35.

[6b] (1955) 39 Cr.App.R. 84.

[7] *Journal of African Law*, Vol. 2, 1958, No. 1, at p. 5.

> to sum up the evidence, but, as said in *Washington* v. *R.*,[7a] it is a very sound practice, which is almost invariably followed by judges in East African territories except in the very simplest cases."

Sir John Gray's comments are true of the practice in West Africa. In some of the territories, there is a statutory provision similar to the relevant sections in the East African Criminal Procedure Codes. For example, section 286 (1) of the Criminal Procedure Code in 1949 of the Gold Coast (as it then was), reads:

> " When in a case tried with assessors, the case on both sides is closed, the judge may sum up the evidence for the prosecution and the defence . . ."

and section 318 (1) of the Criminal Procedure Code of Kenya [8] is in identical terms. The Judicial Committee of the Privy Council in interpreting section 286 (1) of the Criminal Code of the Gold Coast (now Ghana) in the case of *Boateng* v. *The King*,[9] impliedly held that this section only entitled the judge to sum up the evidence to the assessors. On the other hand, in Sierra Leone for example, no such provision is made although the practice of summing up to the assessors is in force. In either case there is no statutory obligation to sum up to the assessors.

Where, however, there is a statutory discretion conferred on the judge to sum up, should the judge sum up the law as well as the evidence? The West African Court of Appeal in *Rex* v. *Tawiah and Two Others* [10] in its interpretation of section 286 of the Criminal Procedure Code of the Gold Coast (quoted above) gave this answer:

> " . . . a clear distinction exists between the language of section 286 of the Criminal Procedure Code, which deals with the procedure for the summing up to assessors, and that of section 276 which makes the provision for the summing up by a judge to a jury. Section 286 merely provides that the judge may sum up to the assessors the evidence for the prosecution and the defence: and therefore when the judge does sum up, he does so in relation only to the facts and not to the law. In contradistinction to this, section 276 requires that the judge in a case tried with a jury ' shall, if necessary, sum up the law and the evidence.' "

[7a] (1954 21 E.A.C.A. 392.

[8] The words in both sections are derived from s. 309 of the Indian Criminal Code of 1898.

[9] (1949) 12 West African Court of Appeal Reports, p. 242 at p. 243.

[10] (1949) 12 West African Court of Appeal Reports, p. 416 at p. 417.

On the view taken by the West African Court of Appeal in *Tawiah's* case, it would follow that an omission to direct the assessors on the law relating to the offence with which the accused is charged, would not be fatal to a conviction, as it would be in a case where the accused is tried with a jury.[11] This view is open to criticism. The assessors are expected to give opinions concerning the guilt or innocence of the accused of the offence charged, and they can only do so, it is submitted, if, at least the elements of the offence and the standard of proof required by law, are made known to them. They cannot be presumed to know the law on the matter. This criticism is supported by *R.* v. *Amponsah and Three Others*,[12] the first reported decision of the West African Court of Appeal on the effect of an omission to direct assessors on a point of law. This was a case in which the accused had been charged with murder. Death had occurred as a result of persistent assaults on the deceased, who had been suspected by the accused to have stolen some money and other things from a house. It was contended on appeal that there was no evidence that any of the appellants had intended to kill the deceased. According to section 13 (3) of the Criminal Code of the Gold Coast (now Ghana), if using reasonable caution and observation it would have appeared to the appellants that there would have been great risk of the assaults causing or contributing to cause the death of the deceased, they should be presumed to have intended to cause his death unless they believed that the act would probably not cause or contribute to cause his death. In this case, the West African Court of Appeal found that there was no express intention to kill the deceased, and therefore felt that "*this was eminently a case in which the assessors should have been directed as to the difference between murder and manslaughter*." This did not appear to have been done by the trial judge, although it appeared in the record of his note that he told them that if the express intention was negatived by the evidence, it was within their province to give their opinions that the prisoners were guilty of manslaughter. Nowhere in the record did it appear that he directed the assessors on the presumption (rebuttable, of course), created by section 13 (3) of the Code. The appeal was allowed. *Amponsah's* (1938) case was a case tried in the Gold Coast (now Ghana) as was *Tawiah's* (1949) case, in which it was implied that an omission to direct the assessors on the law was not fatal to a conviction. The reason for this change of view by the West African Court of Appeal is not that the statutory provisions, where they are in force, had been altered but that a series of decisions in later years emphasised the difference between trial by assessors and trial by jury, in that the judge was not bound by the assessors' opinions and that the decision in a criminal case vested exclusively in him.[13] Unless, therefore, it can be shown that the judge had erred in his decision or judgment, the West African Court of Appeal would not regard an omission to direct the assessors on a question of law as fatal to a conviction.[14]

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[11] In *R.* v. *Dankwa* (1951) 13 West African Court of Appeal Reports, p. 134 at p. 137, the Court of Appeal in a case of an omission to direct on the onus of proof where there had been a failure of an alibi, the court upholding the conviction referred to s. 286, that there was no statutory obligation to direct the assessors on a question of law.

[12] (1938) 4 West African Court of Appeal Reports, p. 120.

There are four reported leading cases on this point, namely, *R.* v. *Wuseni*[15]; *R.* v. *Dagarti*[16]; *R.* v. *Bio*[17] and *R.* v. *Dankwa.*[18]

In *R.* v. *Wuseni*,[19] the appellant had been convicted of the murder of one Karimu in the Protectorate of Sierra Leone. At the trial the judge had omitted to direct the assessors that the accused was entitled to the benefit of any doubt they might have had, or that it was the duty of the prosecution to establish the charge beyond reasonable doubt. The West African Court of Appeal nevertheless dismissed the appeal. In the course of the judgment, two cases were discussed by the court, namely, *Lawrence* v. *R.*[19a] and *R.* v. *Annan.*[19b] In both cases such an omission as occurred in this case had been held fatal to a conviction. The court distinguished these cases as follows:

> "*Lawrence* v. *R.* laid down that it is essential that the tribunal of fact should understand the principle that a criminal charge has to be established by the prosecution beyond reasonable doubt. In a jury case the jury is the tribunal of fact, but in a case with assessors section 43 (3) of the Protectorate Courts Jurisdiction Ordinance, 1932, provides that 'the decision shall be vested exclusively in the judge,' to whom, of course, the principle is well known."
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> "The present case is distinguishable from the Gold Coast case of *R.* v. *Annan* to which our attention was very properly

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[13] This difference in trials by jury and with the aid of assessors was emphasised by Privy Council in *Joseph* v. *R.* [1948] A.C. 215.

[14] In effect, this limited appeals to questions of misdirection as distinct from non-direction, for as was pointed out in *Dankwa* (1951) 13 West African Court of Appeal Reports, p. 134 at p. 137, a judge is presumed to know the law unless there is something in his judgment which gives a contrary indication.

[15] (1939) 5 West African Court of Appeal Reports, p. 73.

[16] (1944) 10 West African Court of Appeal Reports, p. 272.

[17] (1945) 11 West African Court of Appeal Reports, p. 46.

[18] (1951) 13 West African Court of Appeal Reports, p. 134.

[19] (1939) 5 West African Court of Appeal Reports, p. 73.

[19a] [1933] A.C. 699.

[19b] Gold Coast F.C. 1926–29.

> drawn by counsel for the appellant, since in that case the trial judge, after misdirecting the assessors evidently based his decision entirely on their opinions, and it was impossible to say what the decision would have been but for the misdirection."

The effect of R. v. *Wuseni* was that where there was an omission to direct the assessors on a question of law, it would be presumed that the judge directed himself aright unless it can be shown that his decision was based *entirely* on the opinions of the assessors. *R.* v. *Dagarti*[20] followed by *R.* v. *Wuseni.* That was also a case of murder and, although *R.* v. *Wuseni* was not cited the judgment of the court explained what has been submitted is the true effect of *Wuseni's* case. In its judgment dismissing the appeal the court said:

> "(a) It was tried with assessors and not a jury, and by virtue of the provisions of sections 261 and 264 of the Criminal Procedure Code the decision was vested exclusively in the judge, and the opinions of the assessors were opinions only and did not amount to the verdict. Although the judge did not mention it to the assessors, it must be presumed that in coming to his own conclusion he did not overlook the well-known principle of law that the accused is entitled to the benefit of a reasonable doubt; and
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> "(b) In the present case it can be predicted that properly directed the assessors must have expressed the same opinions, because the appellant admitted facts which must, in law, amount to murder and clearly not to manslaughter only."

R. v. *Bio*[21] was also a case of murder. In allowing the appeal the court said:

> "In some cases omission to direct the assessors on some point does not necessitate the quashing of a conviction, more especially when the decision rests with the judge alone, and he has clearly arrived at his finding independently of the assessors' views. But in this case the judge has stated unequivocally that if the assessors had 'thought otherwise' he would have deferred to them, in other words, in coming to his decision he accepted the guidance of the assessors' views. It was, therefore, essential —just as essential as in a trial with a jury—that the assessors should be correctly and fully instructed in the judge's summing up."

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[20] (1944) 10 West African Court of Appeal Reports, p. 272.

[21] (1945) 11 West African Court of Appeal Reports, p. 46.

Implicit in the passage above is the view that the judge is entitled to arrive at his decision independently of the assessors' views. It is submitted that what the judge is entitled to do is to arrive at a decision contrary to the opinions of the assessors. The statutory provisions provide that the assessors should aid and assist the judge at the trial, and it must be presumed that in coming to his decision the judge would consider and take into account the opinions given by the assessors. " . . . *the provision,*" the Privy Council has said,[22] "*for giving the judge, at his request, the assistance of a native assessor cannot be regarded solely from the point of view of aid given to the judge. It operates, and no doubt is intended to operate, as a safeguard to natives accused of crime, and a guarantee to the native population that their own customs and habits of life are not misunderstood.*"

We now come to *R.* v. *Dankwa.*[23] This was a case from the Gold Coast (now Ghana). The appellants had been charged with "offences against the safety of the state." The facts disclosed a local political dispute of a violent character between two rival factions. The police intervened to restore order and met with armed resistance, and in the course of quelling the disturbance one policeman was killed and a number of others wounded. At the trial, the defence was an alibi. The judge in his summing up omitted to direct the assessors that the failure of an alibi did not lessen the onus on the prosecution. In its judgment, at page 37, the court said:

> "But a judge is presumed to know the law (*Ex p. Markham*) unless there is something in his judgment which gives a contrary indication. We can find nothing of the sort here, and nothing to support the submission that the learned judge can be shown to have regarded an unsuccessful alibi as proof of guilt. Moreover, this was a case tried, not with a jury but with the aid of assessors. In such trials the decision, after the assessors have given their opinions, rest 'exclusively in the judge' (section 264 of Cap. 10, and the case of *R.* v. *Wuseni*)."

It is submitted that the rule established by the four cases, *Wuseni, Dagarti, Bio* and *Dankwa,* discussed above, appears to be, that an omission to direct the assessors on a point of law is not fatal to a conviction unless it is shown (a) that there is something in the judge's decision which indicates that he did not direct himself aright—*Dankwa*; or (b) that he accepted and based his decision entirely on the opinions of the assessors—*Wuseni, Bio*; and (c) that it cannot be predicted that properly directed the assessors must have expressed the same opinions—*Dagarti*.

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[22] *Dhalamini* v. *R.* [1943] 1 All E.R. 463, 466.

[23] (1951) 13 West African Court of Appeal Reports, p. 134.

If the rule as stated above is correct, it follows that the first reported case of *Amponsah* [24] discussed above is at variance with the later decisions, and must be taken to have been overruled. However, the contention here is that *Amponsah's* case states the correct rule, and that the later decisions must be regarded as having been overruled by the Privy Council in *Conteh* v. *The Queen*,[25] a case from Sierra Leone decided in 1956. The summary of the facts in the *Law Reports* reads as follows:

> "The gist of the offence of conspiracy to accuse another of a crime is that the accusation should be false to the knowledge of those conspiring. Where, therefore, at the trial of the appellants, who were convicted on a charge of conspiracy to accuse certain persons of the crime of murder, the judge in the course of his summing-up, while he had referred to evidence, which, if believed, would support the agreement falsely to accuse, had nowhere referred to the necessity of proving the falsity of the belief, the conviction must be quashed."

In this case, the appellant had been refused leave to appeal out of time to the West African Court of Appeal. The Privy Council had granted him special leave to appeal against his conviction. That being the case, the Board was in the same position as the West African Court of Appeal when dealing with the question of non-direction, that is to say, the decision of the Privy Council was on a first and not on a second appeal. True enough, the West African Court of Appeal decisions on non-direction were not cited to the Board, but the Crown did not seek to support the conviction. It may be said that the Privy Council in *Conteh's* case did not have to make any pronouncement on the subject of a proper direction of assessors. Three years later, however, in *Bharat* v. *R.*,[26] a case went up to the Privy Council in which the appellant had been charged with murder in Fiji and tried with the aid of assessors. The defence had been (a) self-defence, and (b) provocation. At the hearing of the appeal before the Board, the Crown conceded that there had been a misdirection on the issue of provocation. Denning L.J., who delivered the opinion of the Board, said [27]:

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[24] (1938) 4 West African Court of Appeal Reports, p. 120.
[25] [1956] A.C. 158; (1956) 1 West African Law Reports, p. 49.
[26] [1959] A.C. 533.
[27] At pp. 539–540.

> "What is the consequence of the misdirection given by the judge to the assessors? According to section 246 of the Criminal Procedure Code the trial is by the judge 'with the aid of assessors.' The judge is not bound to conform to their opinions, but he must at least take them into account. If they have been misdirected on a vital point, their opinions are vitiated. Take this very case. Suppose the assessors had been properly directed, is it not possible that one or more of them might have been of opinion that the appellant was guilty of manslaughter only? If the majority of them had given such an opinion, the judge might possibly have accepted it in preference to his own. At any rate, he could hardly have rejected it without saying why he did so. He has, in truth, by his misdirection, disabled the assessors from giving him the aid which they should have given; and thus, in turn, disabled himself from taking their opinions into account as he should have done. This is a fatal flaw.
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> "On behalf of the Crown it was said that the misdirection did not matter, because the judge disbelieved the appellant's story altogether, and there was thus no foundation on which an issue of provocation could be raised. Their Lordships cannot accept this contention. Apart altogether from the appellant's evidence, there was some evidence of a struggle having taken place. Their Lordships think this was clearly a case where the question of provocation should have been considered: see *Bullard* v. *The Queen*.[28] The failure of the judge to direct the assessors properly upon it, or to consider it himself in his summing-up, means that his judgment cannot stand.
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> "For these reasons their Lordships have advised Her Majesty that the appeal should be allowed and the order below set aside, and the case remitted to the Court of Appeal of Fiji with the direction that they should quash the conviction for murder, and either enter a verdict of manslaughter and pass sentence accordingly, or order a new trial, whichever course they consider proper in the interests of justice in the existing circumstances."

To conclude this part of this article it is apposite to quote from the judgment of the West African Court of Appeal in *Amponsah's* case,[29] which it has been submitted states the correct rule to be applied in cases of non-direction [30]:

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[28] [1957] A.C. 635; [1957] 3 W.L.R. 656; 42 Cr.App.R. 1.

[29] (1938) 4 West African Court of Appeal Reports, p. 120 at p. 123.

[30] Before the opinion of the Privy Council in *Bharat's* case, Mr. Justice Watkin-Williams of the Supreme Court of Sierra Leone in a criminal trial

"It is possible that if the question of whether the offence of murder or manslaughter had been committed had been more clearly dealt with by the trial judge, the assessors would have expressed the opinion that the offence of manslaughter and not murder had been established. Whilst it is certain that they would have expressed the opinion that one or the other had been committed, our own view is that the proper verdict would have been one of manslaughter. For these reasons, and acting under the special power of the court given by section 11 (2) of the West African Court of Appeal Ordinance, we substitute for the verdict found by the court below a verdict of guilty of manslaughter." [31]

(*to be continued*)

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in 1959 on the application of counsel for the defence discharged assessors, who had heard evidence of a confession adduced by the Crown and which later appeared to have been inadmissible. He expressed the view the assessors had been disabled thereby because of the possibility of their returning contaminated opinions, and therefore could not properly give him the aid which it is contemplated he should receive from them. In England (Archbold, para. 602), the prisoner in such a case can be remanded for a fresh trial and that was what the judge did in the instant case.

[31] The effect of a misdirection has not been discussed, since if the submission as to the true rule in cases of non-direction is correct, it follows *a fortiori* that the submission holds in cases of misdirection.

Case and Comment[*]

ACCESSORY BEFORE THE FACT

Manslaughter — abortion — death resulting from unlawful act — accessory to involuntary manslaughter—whether possible

See R. *v.* BUCK AND BUCK, *post*, p. 760.

BURDEN OF PROOF

Trial—jury misdirected—onus always on prosecution to prove guilt

See R. *v.* BENTLEY, *post*, p. 777.

FRAUDULENT CONVERSION

Company directors—whether directors for purposes of Larceny Act, 1916, s. 20 (1) (ii)

R. v. Waller, Hutton and Artis

Central Criminal Court: His Honour Judge Maxwell Turner: April 26 to May 30, 1960.[1]

The defendants were charged in a number of counts, *inter alia*, with fraudulent conversion under section 20 (1) (iv) (*b*) of the Larceny Act, 1916, and with fraudulent conversion by a company director under section 20 (1) (ii) of the Larceny Act, 1916. W. and A. were appointed alternate directors of a company under authority of a resolution passed at a meeting at which the majority shareholder was not present, although shown in the minutes as present. Other persons were substituted for them under authority of the same resolution, but there was some doubt whether the substitution ever came to their notice and they continued to act. A director of the company was induced to sign a number of blank bills of exchange, which were completed for sums unauthorised by the director. One of the defendants added his signature to the bills as alternate director and the bills were then used for purposes other than those of the company.

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[*] Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For the prosecution: *Buzzard* and *Corkery* (instructed by the Director of Public Prosecutions). For Waller: *L. Caplan, Q.C.*, and *D. Hyamson* (instructed by Arthur Taylor and Co., 83 Kingsway, W.C.2). For Hutton: *C. Nicholls* (instructed by Ludlow Head and Walter, Broadcourt Chambers, Covent Garden, W.C.2). For Artis: *C. J. Crespi* (instructed by Claude Hamly & Co., 35/36 Gt. Marlborough St., W.1).

After argument citing: *Gibson* v. *Barton* (1875) L.R. 10 Q.B. 329; *R.* v. *Atkins* (1900) 64 J.P. 361; *R.* v. *Lawson* [1905] 1 K.B. 541; *Dean* v. *Hiesler* [1942] 2 All E.R. 340; *Morris* v. *Kansson* [1946] A.C. 459, his Lordship instructed the jury that W. and A. were directors for the purposes of the section and that the time to be considered was that of the conversion when deciding whether the conversion was fraudulent or not, the fact that the property was received as the result of deceit on the part of the prisoners was not sufficient to prove that the subsequent conversion was fraudulent but was strong evidence as to their state of mind at the time of the conviction.

W. was found guilty on all counts left to the jury and was sentenced to four years and six months' imprisonment. A. was acquitted on one count (uttering a forged document) and sentenced to two years' imprisonment.

Commentary. In *R.* v. *Atkins* (above) it was held by the Recorder of London that, under the Larceny Act, 1861, ss. 81 and 83, the words, " being a director " required the prosecution to prove that the person charged was properly appointed a director. In *Dean* v. *Hiesler* (above) comparable words in the Defence (General) Regulations, reg. 91, were similarly construed. Regulation 91, being a penal enactment, must be strictly construed, and " being a director " could not, therefore, include a person who was acting as a director or purporting to fill that office. The same words are used in section 20 (1) (ii) of the Larceny Act, 1916, and it would seem clear that the same construction should be put upon them. Presumably the evidence in the present case clearly showed that the defendants were directors.

The direction as to the time at which the fraudulent intent must be proved to have existed seems to be clearly correct. A guilty retaining is not a guilty receiving: *R.* v. *Matthews* (1949) 34 Cr.App.R. 55 and no doubt the converse is also true.

HOMICIDE

Manslaughter — abortion — death resulting from unlawful act — whether there can be accessory before the fact to involuntary manslaughter

R. v. Buck and Buck

Leeds Assizes: Edmund Davies J.: March 21, 22, 1960.[2]

Olive B. was charged with manslaughter and her son Leonard B. with being an accessory before the fact to manslaughter. He had acted as go-between between his mother and a Mrs. G. who desired an abortion to be performed upon herself, and had brought his mother to Mrs. G.'s house to perform the abortion. He took no further part in the matter. Although Mrs. B. performed the operation with care, the shock of the operation caused the almost immediate death of Mrs. G. Evidence was given that whilst death through shock was always a possible consequence of an abortion, it occurred very rarely.

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[2] For the prosecution: *A. B. Goss* (instructed by the Director of Public Prosecutions). For the defence: *C. D. Chapman* and *D. Wagstaff* (instructed by Wright & Wright, Keighley).

At the close of the prosecution case the defence made two submissions: (1) (in the case of both accused) that it was no longer the law that death resulting from an unlawful act, even where that act was a felony, was of necessity manslaughter; and (2) (in the case of the male accused) that there could not be an accessory before the fact to involuntary manslaughter.

On (1) counsel argued that there were only two categories of constructive crime, (a) where killing resulted from a felony of violence, which was murder until abolished by Homicide Act, 1957, and (b) killing in pursuit of an unlawful purpose, which ceased to be the law after *Andrews* v. *D. P. P.* [1937] A.C. 576. There was no category in between where death resulted from the commission of a felony not being a felony of violence. He conceded that an abortionist who performed the operation with negligence or recklessness, and death resulted, would be guilty of manslaughter. *R.* v. *Lumley* (1912) 76 J.P. 208 had been overruled by *Andrews*.

The prosecution replied that if one person interfered feloniously with the body of another person with or without that person's consent, and that person died as a result, quite clearly that was manslaughter.

On (2) counsel conceded that Leonard B. might be guilty of being accessory before the fact to abortion, but argued that he could not be regarded as having counselled or procured his mother to commit manslaughter. *R.* v. *Gaylor* (1857) Dears. & B. 288, which was relied on by the prosecution, should not be followed in view of the later decision in *R.* v. *Fretwell* (1862) 9 Cox C.C. 152.

Held, rejecting both submissions, as to (1), that criminal abortion was an offence which involved a considerable risk to the person, no matter with what care it might be committed. Where death was proved to have resulted therefrom, there must at least be a conviction for manslaughter (following *Lumley*; considering and distinguishing *R.* v. *Franklin* (1883) 15 Cox C.C. 163 and *Andrews* v. *D. P. P.*).

As to (2), there could be an accessory before the fact to involuntary manslaughter and therefore a person who procured another to commit a criminal abortion was guilty of being an accessory before the fact to manslaughter if death resulted. (Approving *Archbold*, para. 4147, Glanville Williams, *Criminal Law*, para. 60, and *Russell on Crime*, pp. 168–169, and following *Gaylor*; considering *R.* v. *Smith & Taylor* (1847) 2 Cox C.C. 233; considering and distinguishing *Fretwell*).

No evidence being called for the defence, both accused were convicted. [JOHN M. COLLINS, *Barrister-at-Law*.]

Commentary. Until the present century it was the law that death caused in the course of committing any felony was murder. Indeed, the Royal Commission on Capital Punishment reported (para. 85) in 1953: "So far as we are aware, the doctrine that any killing in the course of the commission of any felony is murder has never been expressly overruled by the courts; and judicial witnesses [Lord Goddard C.J., Humphreys and Byrne JJ.] gave it as their opinion that in strict theory this was probably still the law. ✓ They hastened to add, however, that in practice it had been dead for many years, and that if the killing was unintentional a modern judge would direct the jury to bring in a verdict of manslaughter unless the felony was one involving violence."

The modification of the stricter rule of constructive malice began at the end of the nineteenth century. In 1898, Bigham J. directed, in the case of a man who caused death while procuring an abortion, "I tell you as a matter of law, that if you are of opinion that the girl died as a result of the prisoner's unlawful operation, he is guilty of murder." He then went on, however, to modify this, by telling the jury that they could acquit of murder if they thought that the prisoner, as a reasonable man, could not have contemplated the possibility of death as a result of his act. "If the prisoner, as a reasonable man, could see no possibility of death, then you can find a verdict of manslaughter": *R.* v. *Whitmarsh* (1898) 62 J.P. 711. A similar direction was given in other cases of this type, but in *D. P. P.* v. *Beard* [1920] A.C. 479 it was made clear that where the felony was a violent one, the old rule of constructive murder still applied. Constructive murder was, of course, abolished by the Homicide Act, 1957, but this did not in any way affect the rule laid down in *Whitmarsh* and subsequent cases that death caused by committing abortion, where death was not foreseen, is manslaughter.

Nor would it seem that this rule is affected by *Andrews* v. *D. P. P.* This case may have the effect of abolishing the rule that death caused while committing an unlawful act, not amounting to a felony, is manslaughter (though this is by no means certain—see Glanville Williams "Constructive Manslaughter" [1957] Crim.L.R. 293); but the case of a death caused while committing a *felony* was not in issue and was not considered by the court. On Constructive Malice generally, see J. W. C. Turner, "The Mental Element in Crimes at Common Law," *The Modern Approach to Criminal Law*, 195. ✓

It was once thought that there could be no accessory before the fact to manslaughter, but this view was rejected by Bramwell B. in *Gaylor* and the present case is clearly right in principle.

Murder—diminished responsibility—irresistible impulse of sexual psychopath

R. v. Byrne

Court of Criminal Appeal: Lord Parker C.J., Hilbery and Diplock JJ.: July 4, 1960.[3]

B. was convicted at assizes of murder and sentenced to imprisonment for life. The victim was a young woman whom B. strangled in a hostel, and after her death he mutilated the body. At the trial the facts as to the killing were not disputed; and the only defence was that in killing the young woman B. was suffering from diminished responsibility within the meaning of section 2 of the Homicide Act, 1957, and, accordingly, was guilty not of murder but of manslaughter. The medical evidence for the defence, which was uncontradicted, was that B. was a sexual psychopath and that he suffered from abnormality of mind arising from a condition of arrested or retarded development of mind or inherent causes. A sexual psychopath, according to the medical evidence, was one who suffered from violent perverted sexual desires which were difficult or impossible to control, but such a person might, when not under the influence of such desires, be normal. It was the opinion of the doctors that B. was under the influence of his perverted sexual desires when the killing was done, but that he was not insane within the M'Naghten rules. The jury were directed that, if on the evidence they came to the conclusion that the act of killing the young woman was done under an impulse or urge which was very difficult or perhaps impossible to resist, then those facts alone would not constitute such abnormality of mind as substantially to impair the accused's mental responsibility for his acts. On appeal to the Court of Criminal Appeal on the ground of misdirection:

Held, allowing the appeal and substituting a verdict of manslaughter, that before the passing of the Homicide Act, 1957, the law recognised that loss of self-control induced by provocation was capable of reducing murder to manslaughter. The criterion there was the degree of self-control which would be exercised by a reasonable man. In the case of the defence of insanity, if the accused had the intellectual ability to appreciate the physical act that he was doing and whether it was wrong, his power to control his act by exercise of his will was irrelevant. It was against that background of the existing law that section 2 (1) of the Act of 1957 fell to be construed. Under that subsection the accused had to show that he was suffering from abnormality of mind (arising from a condition of arrested or retarded development of mind or any inherent causes or was induced by disease or injury) such as substantially impaired his mental responsibility for his acts in doing or being a party to the killing. "Abnormality of mind" was an expression wide enough to cover not only the perception of physical acts and the ability to form a rational judgment as to whether an act was right or wrong, but also the ability to exercise will-power to control physical acts. Whether the accused was at the time of the killing suffering from "abnormality of mind" was a question for the jury to decide, taking into consideration all the evidence including the acts or statements of the accused and his demeanour. If the jury decided that question in the affirmative, then the further question arose: Was the abnormality such as substantially impaired his mental responsibility for his acts in doing or being a party to the killing? This question involved a consideration of the extent of the accused's ability to exercise will-power to control his physical acts and, if there was some impairment, whether such impairment could properly be called "substantial." This was a question of degree and essentially one for the jury. The step between "he did not resist his impulse" and "he could not resist his impulse" was one which was incapable of scientific proof. It appeared to this court that the trial judge's direction to the jury amounted to a direction that difficulty or even inability of an accused person to exercise will-power to control his physical acts could not amount to such abnormality of mind as substantially impaired his mental responsibility. In the opinion of this court, that construction of the Act was wrong. Inability to exercise will-power to control physical acts, provided that it was due to an abnormality of mind from one of the causes specified in the subsection, entitled the accused to the benefit of the section. The accused might also be entitled to the benefit of the section where the case was one of difficulty in controlling physical acts and, in such a case, it was for the jury to decide on the balance of probabilities whether the degree of difficulty was such as to amount to a substantial impairment of the accused's mental responsibility for his acts. The direction to the jury in the present case thus withdrew from the jury the determination of fact which it was their province to decide. Properly directed the jury could have come to no other conclusion than that the defence under section 2 of the Act of 1957 had been made out. Accordingly the appeal would be allowed and a verdict of manslaughter would be substituted for the verdict of murder. [H. P.]

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[3] For the appellant: *R. K. Brown, Q.C.*, *John Owen* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *John Hobson, Q.C.*, *Mrs. E. K. Lane* (instructed by the Director of Public Prosecutions).

Commentary. In *R.* v. *Spriggs* the Court of Criminal Appeal said that all that the trial judge could do in a case where diminished responsibility was raised was to read the section to the jury and instruct them to apply the tests stated therein. This is obviously unsatisfactory where (as in *Spriggs*) conflicting submissions are made by counsel as to the meaning of diminished responsibility. The construction of statutes is a matter of law and exclusively within the province of the judge. It is submitted therefore that the trial judge was clearly right in attempting to explain to the jury the extent of the section in the present case, although the explanation which he in fact offered is now held to be wrong.

The courts have always resisted attempts to widen the ambit of the M'Naghten Rules by the inclusion of the defence of so-called irresistible impulse. That defence now seems to be admitted into our law, so far as murder is concerned, by way of diminished responsibility.

Murder—intent—presumption of reasonable man as to consequences of his act

D. P. P. v. Smith

House of Lords: Lords Kilmuir, Goddard, Tucker, Denning and Parker of Waddington: [1960] 3 W.L.R. 546.[4]

S. was driving his car when he was asked to stop by a police officer. S. did not stop, and the officer clung on to the offside of the car. S. drove about a hundred yards, gaining speed and pursuing an erratic course, until the officer was shaken off and fell in front of an oncoming car. The officer received fatal injuries. S. was charged with capital murder.

In his summing-up, the trial judge said to the jury: "If you are satisfied that . . . he must as a reasonable man have contemplated that grievous bodily harm was likely to result to that officer . . . and that such harm did happen and the officer died in consequence, then the accused is guilty of capital murder . . . On the other hand, if you are not satisfied that he intended to inflict grievous bodily harm upon the officer—in other words, if you think he could not as a reasonable man have contemplated that grievous bodily harm would result to that officer in consequence of his actions—well, then, the verdict would be guilty of manslaughter." S. was convicted of capital murder. The Court of Criminal Appeal, allowing an appeal and substituting a verdict of manslaughter, held that the trial judge had misdirected the jury ([1960] Crim.L.R. 491). On appeal to the House of Lords:

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[4] For the Director of Public Prosecutions: *Sir Reginald Manningham-Buller, Q.C., Att.-Gen., J. M. G. Griffith-Jones* and *S. A. Morton* (instructed by the Director of Public Prosecutions). For S.: *Edward Clarke, Q.C., Audrey Jennings and D. B. Watling* (instructed by Prothero & Prothero).

Held, allowing the appeal and remitting the case to the Court of Criminal Appeal, that it was immaterial what S. in fact contemplated as the probable result of his actions, provided he was in law responsible for his actions; that the sole question was whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result; and that the only test of this was what the ordinary responsible man would, in all the circumstances, have contemplated as the natural and probable result. [D. C.]

Commentary. This remarkable decision lays down a test for the law of murder which is staggering in its severity. The only *mens rea* which the prosecution need prove, it seems, is an intention to do "something to someone." The thing so done must be unlawful, it must be something which a reasonable man would foresee as likely to cause death or grievous bodily harm and it must in fact cause death. Whether the accused knew that his act was unlawful is presumably irrelevant, for ignorance of the law is no defence in criminal cases; and this case decides that it is irrelevant whether *he* foresaw the likelihood or even the possibility of death or grievous bodily harm as the result of his actions. "The unlawful and voluntary act must clearly be aimed at someone in order to eliminate cases of negligence or of careless or dangerous driving. Once, however, the jury are satisfied as to that, it matters not what the accused in fact contemplated as the probable result or whether he ever contemplated at all, provided he was in law responsible and accountable for his actions . . . On the assumption that he is so accountable for his actions, the sole question is whether the unlawful and voluntary act was of a kind that grievous bodily harm was the natural and probable result." The consequences of this rule may be seen by reference to the facts of the civil case of *Smith* v. *Crossley* (1951) 95 S.J. 655. Two apprentices played a practical joke on a third by turning on a compressed air pipe near his rectum. The result was that the third apprentice suffered a ruptured colon and severe shock. The two humorists intended to do "something to someone," that thing was unlawful and the reasonable man would certainly have appreciated that it was likely to do grievous bodily harm, though it seems certain that the larking apprentices did not so realise. If the victim had died (as he did not but clearly could have done) it seems that the two practical jokers would have been guilty of murder under the test laid down by our highest tribunal; which, with great respect, is absurd.

The unsatisfactory nature of the present decision is further illustrated by the fact that in much less serious crimes involving malice the courts do require proof of an actual foresight of the occurrence of the type of injury for which the accused is being tried. In *R.* v. *Cunningham* (1957) 41 Cr.App.R. 155 the Court of Criminal Appeal approved of Professor Kenny's statement of the general principles, propounded as long ago as 1902, governing this type of case: "In any statutory definition of a crime, malice must be taken not in the old vague sense of wickedness in general but as requiring either (1) An actual intention to do the particular kind of harm that in fact was done; or (2) recklessness as to whether such harm should occur or not (*i.e.*, the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it)." Following this statement, the court held that it "should have been left to the jury to decide whether, even if the appellant did not intend the injury to Mrs. Wade, *he foresaw* that the removal of the gas meter might cause injury to someone but nevertheless removed it." Again, on a charge of wounding with intent to murder, the court specifically held in *R.* v. *Foley* [1959] Crim.L.R. 286 that "it was not enough for the prosecution to rely upon the presumption that a man intended the natural consequences of his act. Where a specific intent was alleged and was a necessary constituent of the offence, as here, it was for the prosecution to prove that intent. The proper direction as to proof of that intent was, as had been laid down in *R.* v. *Steane* [1947] K.B. 997, that the jury were entitled to seek aid from the presumption (that a man intends the natural consequences of his act), yet they must consider the totality of the evidence and on that decide whether they were satisfied that the alleged intent existed." In *R.* v. *Loughlin* [1959] Crim.L.R. 518 the court quashed a conviction for attempted murder because the trial judge "had dealt with the presumption that a man was taken to intend the natural consequences of his acts as though it were a matter of law whereas it was, of course, only a matter of fact which the jury should bear in mind together with the totality of the evidence in deciding whether the accused had the necessary intent."

Foley and *Loughlin* were not cited to the House and would, no doubt, have been dealt with in the same manner as *Steane* (on which strong reliance was placed) and distinguished as "special" cases where "over and above the presumed intent there had to be proved an actual intent or, it might be said, a desire by the appellant to [bring about the consequences he was charged with intending]." It is presumed that these cases remain good law.

Cunningham was cited in argument but not referred to in the judgment. Remarkably, however, the judgment of Palles C.B. in *R.* v. *Faulkner* (1877) 13 Cox 550, holding that the test of malice is an objective one, was cited with approval. *Faulkner*, as a decision of the Irish Court of Crown Cases Reserved, is clearly inferior as an authority in England to *Cunningham.* Moreover, it is by no means clear that Palles C.B. was not in a minority, for two of the four judges whose judgments are reported seem to be in favour of the subjective view for which the accused in the present case was contending. Palles C.B.'s judgment is plainly inconsistent with the law as laid down by the Court of Criminal Appeal in *Cunningham.* Again, it can hardly have been intended to overrule *Cunningham* (as well as the line of longstanding cases which lay down the law on malice in similar terms) and the law of murder thus departs from the general principle of English criminal law in a fundamental particular, partly on the authority of an Irish judge who was probably dissenting anyway.

Viscount Kilmuir also relied on *R.* v. *Lumley* (1911) 22 Cox 635. It should be recalled, however, that that was a case of death caused while committing the felony of abortion and that, in directing the jury that they could acquit if the act was such that a reasonable man would have foreseen the likelihood of death, Avory was in fact mitigating the severity of the old rule of constructive malice, by confining it to cases of felonies likely to result in death. (See also *R.* v. *Whitmarsh* (1898) 62 J.P. 711 and J. W. C. Turner, "The Mental Element in Crimes at Common Law" in *The Modern Approach to Criminal Law*.) Nor is *R.* v. *Philpot* (1912) 7 Cr.App.R. 140 a very satisfactory authority for the propositions in the present case. It is true that the court used language favouring an objective test, but it would seem that they were of the view that the jury must have found that the accused (who strangled his wife) had an actual intention at least to do her grievous bodily harm: "The jury found that he killed her in a fit of temper; they added that he did not realise the consequences of his act, but they cannot have meant that he began a harmless act, or one but little blameworthy, which afterwards developed into something causing death."

It is very surprising to find the House also relying on its earlier decision in *Beard* v. *D. P. P.* [1920] A.C. 479 for, on closer analysis, this case is rather an authority in favour of the view contended for by the accused. Viscount Kilmuir quoted Lord Birkenhead's observations on the proposition formulated by Darling J. in *Meade's Case* [1909] 1 K.B. 895, 899. He did not quote the proposition itself, but it is worth setting out *in extenso*:

"A man is taken to intend the natural consequences of his acts. This presumption may be rebutted—(1) in the case of a sober man in many ways; (2) it may also be rebutted in the case of a man who is drunk, by showing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous—*i.e.*, likely to inflict serious injury. If this be proved, the presumption that he intended to do grievous bodily harm is rebutted."

Lord Birkenhead said that this proposition "in its wider interpretation is not and cannot be supported by authority. The difficulty has arisen largely because the Court of Criminal Appeal used language which has been construed as suggesting that the test of the condition of mind of the prisoner is not whether he was capable of forming the intent but whether he was incapable of foreseeing or measuring the consequences of the act." The vital words here are ". . . in its wider interpretation . . ." It must be recalled that Beard caused the death of a little girl while in the course or furtherance of rape. In *Beard* (to quote Lord Birkenhead) "The Court of Criminal Appeal . . . notwithstanding the opinion it had expressed that an act of violence done in furtherance of rape was murder, held that it was bound to follow this decision [*Meade*], and that the jury should have been directed to consider whether Beard, at the time of placing his hand on the child as described, was incapable of knowing that what he was doing was dangerous—that is, likely to cause serious injury."

The "wider interpretation" of the rule in *Meade* consisted in its application to a case of constructive murder—death caused in the course of a violent felony. The *ratio decidendi* of *Beard's* case is that in such circumstances the only *mens rea* which need be proved is the intention to commit the violent felony. There is no suggestion, however, that where death is not caused in the course of an independent felony it is not necessary to prove an actual intention to cause death or grievous bodily harm. Indeed, in the very next paragraph following that quoted by Viscount Kilmuir, Lord Birkenhead said: "In *Meade's* case the crime charged was that death arose from violence done with intent to cause grievous bodily harm. In this case [*sc. Beard*] the death arose from a violent act done in furtherance of what was in itself a felony of violence. In *Meade's* case, therefore, it was essential to prove the specific intent . . ." If the rule laid down in the present case was thought to be the law at that time, obviously it would not have been necessary to prove that specific intent for there was the clearest evidence that Meade intended to do " something " to his wife (*i.e.*, strike her with a broomstick and with his fist) and it could hardly be doubted that that " something " was likely to cause grievous bodily harm. Lord Birkenhead went on: ". . . in *Beard's* case it was only necessary to prove that the violent act causing death was done in furtherance of the felony of rape." Again, if the present case had been law, it would not have been necessary to show so much, for Beard intended to do something to the girl which was manifestly likely to cause grievous bodily harm. But even more important were the Lord Chancellor's next observations: " I do not think that the proposition of law [*i.e.*, that of Darling J., above] deduced from these earlier cases is an exceptional rule applicable only to cases in which it is necessary to prove a specific intent in order to constitute the graver crime—*e.g.*, wounding with intent to do grievous bodily harm or with intent to kill. It is true that in such cases the specific intent must be proved to constitute the particular crime, but this is, on ultimate analysis, only in accordance with the ordinary law applicable to crime, for, speaking generally (and apart from certain special offences), a person cannot be convicted of a crime unless the *mens* was *rea*."

The true view of *Beard's* case, it is submitted, is that the House of Lords accepted the proposition formulated by Darling J. in *Meade*, as good law with one qualification: *i.e.*, that it did not apply where the killing in question was one done in the course or furtherance of a felony of violence, not in itself requiring an intent to kill or to do grievous bodily harm. Since constructive malice was abolished by the Homicide Act, 1957, this one qualification has ceased to be applicable and it would appear, therefore, that the approval given by the House to Darling J.'s proposition might now properly be regarded as unqualified. That proposition, holding as it does that the presumption of intention is rebuttable in murder cases, is inconsistent with the *ratio decidendi* in the present case. Unhappily, the House's approval of Darling J. must be regarded as *obiter* since it was not strictly necessary to the decision and the present case must be regarded as the undisputed authority.

The remaining case on which the House placed reliance was *R.* v. *Ward* [1956] 1 Q.B. 351. This decision certainly supported the rule now laid down by the House; but it has been repeatedly and strongly criticised (see, *e.g.*, " Murder by Mistake " by S. Prevezer [1956] Crim. L.R. 371), and the High Court of Australia declined to follow it in *R.* v. *Smyth* (1957) 98 C.L.R. 163, expressing its preference for Lord Goddard's inconsistent statement in *R.* v. *Steane* which it regarded as " perfectly sound."

Viscount Kilmuir prefaced his consideration of these cases with a citation from *The Common Law* (pp. 53–54) by Holmes J. whose view was that " The test of foresight is not what this very criminal foresaw, but what a man of reasonable prudence would have foreseen." It is strange that the views of this distinguished American writer should have been thought relevant when no reference was made to the opinions of his contemporary Stephen J., (*e.g.*, *History of the Criminal Law*, ii, 119–120) who, in the field of criminal law, might be thought no less eminent an authority. (*Cf.* Jerome Hall, *General Principles of Criminal Law* (2nd ed.) who in a detailed analysis and criticism of Holmes's views, writes that Stephen "was too thoroughly grounded in its [the criminal law's] principles to be misled by the theory of his brilliant American confrère" (p. 158).)

The absence of any consideration by the House of the writings of such distinguished modern writers as Dr. Glanville Williams and Mr. J. W. C. Turner is disappointing; and if academic writers are considered beyond the pale, some reference might have been made to the views of Devlin J. expressed in [1954] Crim.L.R. 668. That learned judge, having pointed out that in attempted murder the prosecution must prove an actual intention to kill, goes on to remark that "this apparent illogicality not only does something to discredit constructive malice [within which term Devlin J. included an intent to cause grievous bodily harm], but also demonstrates that there is no difficulty in practice—no more, indeed, than there is in any other branch of the law—in requiring proof of the intent to commit the crime itself." This seems to be an adequate answer to Viscount Kilmuir's evident fear that the adoption of a subjective approach would put too great a burden of proof on the prosecution. He said: "This purely subjective approach involves this, that if an accused said that he did not in fact think of the consequences, and the jury considered that that might well be true, he would be entitled to be acquitted of murder. My Lords, the proposition has only to be stated thus to make one realise what a departure it is from that upon which the courts have always acted."

Now that the House of Lords ha[illegible] clear that the law of England is that a man may be hanged for murder although his only moral guilt is an intention to do "something to someone," some further reform must surely be considered urgent. The abolition of the doctrine of constructive malice seems to have been almost irrelevant; for it is now held that there has existed all along a doctrine of *mens rea* so strict that almost all (if not all) of those who were convicted under the constructive malice doctrine could equally well have been convicted without it.

The case is criticised by Dr. Glanville Williams, *The Times*, October 12, 1960.

Murder — provocation — self-defence — drunkenness — burden of proof

R. v. Wardrope

Central Criminal Court: Edmund Davies J.: October 13–16, 1959.[5]

W., X and two women spent a great part of the day, drinking together in a public-house. An argument developed between X and W. X was advised by the defendant to go home as he had had too much to drink. X and the two women went home together, later W. followed them to their flat. While getting ready for bed, X became aggressive, called W. a Scots bastard and flicked his belt at him, cutting him near the eye with the buckle. W. then rained a series of blows on X and fell on top of him on the floor. W. then left the flat and the two women went to bed, leaving X lying on the floor, which was a normal place for him to occupy while sleeping off the effects of drink.

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[5] For the prosecution: *J. M. Griffith-Jones* and *Miss Curnow* (instructed by the Director of Public Prosecutions). For the defence: *J. Yahuda* and *S. Stout Kerr* (instructed by H. C. C. Hanne & Co.).

In the morning the two women found X dead. They went and found W. at his place of work and told him what they had found. W. at once took them to the police station, where he made a frank written statement. In a verbal statement he admitted having kicked X.

Post mortem examination revealed very extensive injuries including: (1) Left ear crushed and split away from its attachments; (2) lower jaw fractured in two places; (3) chest buckled in from broadly spread pressure. The cause of death was inhalation of blood due to facial injuries.

At the close of the case for the prosecution the defence, in the absence of the jury, made a submission defining the defence case under the heads of (1) Provocation; (2) Self-defence; (3) Drunkenness, (a) defendant imagined a non-existent danger to himself, (b) he exaggerated an existing danger, (c) he was incapable of forming the necessary intent; (4) Mistake, defendant kicked the deceased during the struggle without knowing with what object his boot came in contact; (5) The deceased possibly injured himself getting up to wash during the night; (6) The two women might have thrown water over the deceased and so caused his death, they might then have forgotten about it in their drunken state.

His Lordship directed the jury:

1. Provocation must be such as to deprive a reasonable man, not a drunken man or a violent tempered man, of self-control and must in fact deprive the accused of self-control. The measures taken by the provoked person must ~~be~~ bear reasonable relationship to the provocation.

2. Self-defence. The steps taken by the defendant must be commensurate with and bear reasonable relationship with the violence threatened or apprehended.

3. Drunkenness. A person whose mind was so impaired by drink as to imagine himself attacked was entitled to take such steps in defending himself as were necessary to meet the imagined attack as if it were real or not exaggerated, subject to the direction on self-defence above.

4. In respect of each of the above defences the burden was on the prosecution to prove their case, to eliminate provocation or self-defence and to show that the defendant was not so affected by drink as to be incapable of forming the necessary intent.

5. The other defences were questions of fact for the jury.

Wardrope was found not guilty of murder but guilty of manslaughter and was sentenced to five years' imprisonment. [C. B. ORR.]

Commentary. Under the Homicide Act, 1957, s. 3, where there is evidence on which the jury can see that the person charged was provoked to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to the jury. Whereas it is open to the judge to withdraw the defence from the jury on the ground that there is no evidence to show that the *accused* was provoked to lose his self-control, he may no longer do so on the ground that there is no evidence that a reasonable man would have been so provoked.

The judge may still influence the answer to the second question, if it is proper for him to describe the characteristics attributed in law to the reasonable man. How far he may go in this direction does not seem to have been yet considered. To tell the jury that the reasonable man is not a violent-tempered man is clearly unobjectionable for it adds nothing to what is implicit in "reasonable," and this is perhaps equally true of the direction that he is not a drunken man. The danger then is that the whole of the pre-Homicide Act conception of the reasonable man will be continued in the law and that juries may be instructed that he is "reasonable" in physical as well as mental characteristics: *cf. Bedder* v. *D. P. P.* [1954] 1 W.L.R. 1119. This would have the effect of partially reintroducing some of the unsatisfactory features of the common law of provocation. It is submitted that there is much to be said in favour of simply leaving the question of the effect of the provocation on a reasonable man to the jury, without any attempt to describe the reasonable man.

The rule in *Mancini* v. *D. P. P.* [1942] A.C. 1 that "the mode of resentment must bear a reasonable relationship to the provocation" is held by the present case still to be applicable. Some justification may be found for this in the words of section 3, which require the provocation to be such as "to make a reasonable man *do as he* [*the accused*] *did*," whereas in the case of the person charged the requirement is that he should "lose his self-control." Yet the Act says that the jury "should take into account everything both done and said according to the effect which, *in their opinion*, it would have on a reasonable man." This seems to preclude directions of law as to the effect on a reasonable man which a jury may attribute to provocative acts.

The direction on the onus of proof is in accordance with well-established authority: *Woolmington* v. *D. P. P.* [1935] A.C. 462; *Mancini* v. *D. P. P.* [1942] A.C. 1 (provocation); *Chan Kau* v. *R.* [1955] A.C. 206; *R.* v. *Lobell* [1957] 1 Q.B. 547 (self-defence): *Beard* v. *D. P. P.* [1920] A.C. 479 (drunkenness).

INDICTMENT

Corruption—conspiracy under Corrupt Practices Act, 1889, s. 1 (2) *—whether particulars charged offences under Prevention of Corruption Act, 1906*

R. v. Grierson and Powdrill

Court of Criminal Appeal: Lord Parker C.J., Byrne and Donovan JJ.: May 23, 1960.[6]

G. and P. were convicted at assizes of offences of corruption and conspiracy. In count 8 of the indictment, G. was charged with giving an inducement to P. in regard to the affairs of the S. corporation, of which P. was engineer; and in count 9, P. was charged as the receiver of the inducement. Both counts were laid under the Corrupt Practices Act, 1889. Section 1 (2) of that Act provides that every person who corruptly gives "any advantage as an inducement for doing or forbearing to do anything" in respect of any transaction in which a public body is concerned, shall be guilty of an offence. The corresponding subsection applying to the recipient is in similar terms. The particulars of the offences set out in the indictment alleged the giving and receiving of "an advantage . . . as an inducement . . . to show favour." It was contended in the Court of Criminal Appeal that the appellants had been wrongly charged, in that the particulars of the offences in counts 8 and 9 did not charge offences against the Act of 1889, but were worded as if they were charges under the Prevention of Corruption Act, 1906.

Held, dismissing the appeal, that the issue was a pure matter of the construction of section 2 (1) of the Act of 1889. That subsection made it an offence corruptly to give any advantage as an inducement for doing or forbearing to do anything. It seemed to this court that "doing or forbearing to do anything" was amply apt to cover the doing or forbearing to show favour. One could not show favour otherwise than by doing or forbearing to do something which conflicted with one's duty as a member of the public body. It had been argued that the phrase "doing or forbearing to do anything" did not cover a course of conduct such as would be embraced by the phrase "showing favour" and that accordingly it had been necessary in the Prevention of Corruption Act, 1906, to add words to embrace a consideration as an inducement to show favour. But the fact that the Act of 1906 had divided what was embraced in that phrase in the Act of 1889 into two limbs could not affect the plain construction of the Act of 1889. It had also been argued that the appellants had been embarrassed by the particulars given in this case because by the use of the phrase "showing favour" they did not know what case they had to meet. But in the opinion of this court it would have been perfectly possible to ask for further particulars, and no argument as to the construction of the Act of 1889 could be based on the absence of particulars. The appeal would accordingly be dismissed.

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[6] For the appellant Grierson: *J. T. Molony, Q.C., Robert Hughes, Miss M. S. D. Beazley* (instructed by Titley, Long & Co., Bath). For the appellant Powdrill: *A. M. Lee* (instructed by Lemon Humphreys Parker & Co.). For the Crown: *Norman Skelhorn, Q.C., Gilbert Rountree* instructed by the Director of Public Prosecutions).

[H. P.]

Commentary. By Rule 4 of the Indictments Act, 1915, Sched. I, the particulars of the offence must be set out in ordinary language in which the use of technical terms is not necessary. The more general wording of the Act of 1889 certainly seems to include within it the act of "showing favour" and the present decision seems an entirely reasonable one.

There would seem to be a case for the consolidation of the 1889 Act and the Prevention of Corruption Acts of 1906 and 1916 into a single statute, eliminating the overlapping of different offences.

ROAD TRAFFIC

Licence to carry goods from one place to another under the Road and Rail Traffic Act, 1933, s. 9—licence holder not entitled to pick up goods at intermediate points

Brown v. Henry Dougal & Sons

High Court of Justiciary: Lord Justice-General (Clyde), Lords Carmont and Russell: 1960 S.L.T. (Court of Session Reports) 19.[7]

A firm of fish merchants, who were the holders of a licence for the use of a lorry for the carriage of fish from Rothesay to Ayr, were charged with contravening the condition of their licence by using the lorry to carry fish from Largs to Ayr, contrary to section 9 of the Road and Rail Traffic Act, 1933. Largs is on the direct route from Rothesay to Ayr. The firm objected to the relevancy of the complaint on the ground that the carriage of fish from Largs to Ayr was within the terms of their licence. The licence was produced in the course of the debate, and the Sheriff-

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[7] For the appellant: *Carmichael, A.-D.* (instructed by Lionel I. Gordon, Crown Agent). For the respondent firm: *Morison* (instructed by I. & R. A. Robertson, W.S., for John, W. & G. Lockhart, Solicitors, Ayr.)

Substitute relied on it in holding that the complaint was irrelevant, and dismissed the complaint.

Held, allowing an appeal and remitting the case to the Sheriff-Substitute for trial, (1) that the Sheriff-Substitute was not, in a debate on relevancy, entitled to refer to the licence which was an unproved production, but was bound to decide relevancy on the terms of the complaint itself; and (2) that a licence to carry goods from one place to another or between two places did not entitle the licence-holder to pick up goods in his vehicles at any point intermediate between the two places, and take them to the destination specified in the licence.

Commentary. It appears that this was the first occasion on which the question of the meaning of a licence under the Act to carry from A to B has been considered by the courts. The court was influenced by section (3) which empowers the licensing authority to attach a condition, *inter alia*, that the vehicles shall be used only in a " specified district or between specified places." The court was of opinion that these words mean precisely what they say. The view was expressed that a contrary conclusion would defeat the whole object of the licensing system.

TRIAL

Autrefois convict—penalties imposed by justices for simple escape under Prison Rules, 1949, r. 42 — conviction at assizes on count of prison breach — whether aggravated form of same offence

R. v. Hogan and Tompkins

Court of Criminal Appeal: Lord Parker C.J., Cassels and Donovan JJ.: July 4, 1960.[8]

H. and T. were convicted at assizes of *inter alia*, prison breach. At the time of the commission of the offence they were both serving sentences of preventive detention and, with another man, they escaped by cutting some wire under a skylight and climbing out. When they were recaptured they were dealt with by the visiting justices under rule 42 of the Prison Rules, 1949, for escaping from prison, and forfeiture of privileges and other penalties were imposed. At the assizes, the learned judge struck out a count charging simple escape and the trial continued in respect of prison breach. Upon conviction for that offence they appealed to the Court of Criminal Appeal on the ground that, having already been dealt with for simple escape, they could not properly be charged with an aggravated form of the same offence.

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[8] For the appellants: *Henry Palmer* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *M. G. Polson* (instructed by John Robinson & Jarvis, Ryde).

Held, dismissing the appeal, that it was undoubtedly a principle of law, as could be seen from *R.* v. *Miles* (1890) 24 Q.B.D. 423, that a man who had been convicted of an offence could not be charged again with an aggravated offence if the offences in both cases arose on exactly the same matter. Though not strictly a case of *autrefois convict*, it was very much on those lines. *Miles*' case remained good law, with the qualification that the principle did not apply where the consequences had changed. Thus in *R.* v. *Thomas* [1950] 1 K.B. 26, a man having been convicted of wounding with intent to murder was subsequently charged with murder, where the person assaulted had died. However, the principle in *Miles*' case could only apply to decisions of courts of competent jurisdiction, and the visiting justices in the present case had dealt with the matter as an offence against discipline under the Prison Rules; they had not dealt with the common law offence of escape. It followed that, strictly, the trial judge need not have struck out the count of simple escape. The visiting justices had been dealing with a matter of internal discipline with which this court was in no way concerned, and there was, accordingly, no ground for interfering with the conviction for prison breach. [H. P.]

Commentary. It seems that an actual breaking is required to constitute the felony of prison breaking, and merely getting over the walls or passing out through a door will not suffice: *R.* v. *Burridge* (1735) 3 P.Wms. 439, 484, *per* Lord Hardwicke C.J., delivering the judgment of the Court of King's Bench. To escape from lawful confinement without any breaking (as, *e.g.*, where the doors are left open by the consent or negligence of the gaoler, or through a breach made by others without his connivance or consent) is a common law misdemeanour. See *R.* v. *Hinds* (1957) 41 Cr.App.R. 143; [1957] Crim.L.R. 465.

Escaping or attempting to escape is also an " offence " under Rule 44 of the Prison Rules, 1949. The Visiting Committee is required by the Rules to inquire into every offence reported to them and, if they find the offence proved, to make one or more of the awards specified in Rule 44. These awards may amount to a quite severe punishment—*e.g.*, forfeiture of remission of sentence for a period not exceeding six months, which, in effect, is equivalent to a sentence of six months' imprisonment. It is unfortunate, therefore, that a prisoner who has already received a punishment which the Visiting Committee think to be appropriate, should be liable to a second punishment for (in substance) precisely the same offence. The legal reasons given in the present case, however—that the Committee was not a court of competent jurisdiction and that they were not trying him for a crime as such—are unimpeachable. In principle, there is no difference between this case and that of an undergraduate, expelled from his university for stealing by the appropriate authority under the university's statutes and subsequently tried for larceny by the court.

Burden of proof—jury misdirected—onus always on prosecution to prove guilt

R. v. Bentley

Court of Criminal Appeal: Hilbery, Cassels and Winn JJ.: July 18, 1960: *The Times*, July 19, 1960.[9]

B. was convicted at quarter sessions of shopbreaking and larceny. At the trial his defence was that he suffered from diabetes; that he had taken an overdose of insulin and also of another drug, zinc protomine, which induced in him a state of mind such that, although he was caught in the act of committing the offence, he was incapable of knowing the circumstances in which he was found or what he was doing. The jury were directed that, if they believed B. and a doctor, they had to find B. not guilty but insane; and later, that the onus of raising that was on the defence, not on the prosecution, although not such a substantial onus to discharge: "If you doubt the case the burden passes from the prosecution. . . . Of course, if you think on the whole the prosecution prove it, and you are satisfied honestly in your own minds, never mind fanciful doubts, that this man did it, you must return a verdict of guilty." On appeal to the Court of Criminal Appeal:

Held, allowing the appeal, that the jury had been misdirected on the onus of proof. The onus rested always on the prosecution to establish the guilt of the accused, and it was enough if a reasonable doubt as to his guilt was raised in the minds of the jury. It seemed to this court that the summing-up, taken as a whole, was almost tearing in two the golden thread which could be said to run right through the criminal law, that the burden of proof rested on the prosecution. The conviction, therefore, had to be quashed. [H. P.]

Commentary. The direction to the jury, that they should return a verdict of guilty but insane if they believed the defence's evidence, is difficult to follow. The M'Naghten Rules apply only where the accused is suffering from a "disease of the mind." The temporary effects of an overdose of a drug would hardly seem to fall within these words. No doubt, prolonged taking of drugs can result in a disease of the mind, just as persistent excessive drinking can; and, when insanity is so caused, it is clear that the M'Naghten Rules apply: *D. P. P.* v. *Beard* [1920] A.C. 479; but "The distinction between the defence of insanity in the true sense caused by excessive drinking, and the defence of drunkenness which produces a condition such that the drunken man's mind becomes incapable of forming a specific intention, has been preserved throughout the cases." There seems to be no reason why drug-taking should be treated differently from drunkenness.

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[9] For the appellant: *Myrella Cohen* (instructed by Messrs. Swinburne & Jackson, Durham). For the Crown: *Oliver Wrightson* (instructed by the Director of Public Prosecutions).

In *Beard's* case it was laid down by the House of Lords that evidence of drunkenness, which renders the accused incapable of forming the specific intent essential to constitute the crime charged, must be taken into account with the other facts proved in order to determine whether or not he had such intent. It is clearly implicit in the phrase, "essential to constitute the crime charged," as in other passages in the judgment, that the onus of proving the existence of the specific intent, and therefore of proving that drunkenness did not prevent its formation, is on the prosecution.

The case illustrates the anomalous and unsatisfactory nature of the rule which puts the onus of proving insanity on the accused. If he alleges that drunkenness or drug-taking (for which he is responsible) prevented him from knowing the nature and quality of his act, the onus of disproving this is on the prosecution. If he alleges that insanity (for which he is not responsible) caused a precisely similar mistake, the onus of proof is on him. See Glanville Williams, *The Criminal Law*, §§ 102, 103.

Acts and Orders *

Agriculture

Regulations made under section 1 of the Agriculture (Safety, Health and Welfare Provisions) Act, 1956 (which on their coming into operation replace, in England and Wales, the provisions of the Threshing Machines Act, 1871), provide for the protection of workers employed in agriculture against risks of bodily injury while working at stationary threshers and balers. The employer of a worker employed in agriculture is prohibited from causing or permitting such a worker to work at a thresher or baler except in accordance with the prescribed requirements, and a number of specified components of all threshers and balers, such as flywheels, are required to be so situated and guarded as to protect workers from coming into contact with them. Provision is made for the proper maintenance of machinery, guards and belts, and for there to be adequate natural or artificial light. It is also required that there shall be a prescribed means of quickly stopping every thresher and baler. Workers are prohibited from being in certain dangerous positions while working at threshers and balers, and the employers are also made responsible for the observance of this requirement. Workers are also required to keep all guards in position (except under certain prescribed conditions), and to report any defects to their employers. Provision is made for the granting of certificates of exemption in suitable cases. The regulations apply to Great Britain, and are operative on August 1, 1961. AGRICULTURE (THRESHERS AND BALERS) REGULATIONS, 1960 (S.I. No. 1199) (6d.).

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* Prepared by F. Maurice Drake, *Barrister-at-Law*.

For penalties for contraventions see section 16 of the Agriculture (Safety, Health and Welfare Provisions) Act, 1956.

Animals

Certain requirements relating to the construction, layout and equipment of existing slaughterhouses, which under the provisions of the principal Order (S.I. 1958, No. 2166) are to come into operation on such day as the Minister may appoint for various areas, are brought into operation on October 1, 1960, in the county boroughs of Nottingham, Plymouth, Sheffield and West Hartlepool; the metropolitan boroughs of Islington and Woolwich; the boroughs of Brecon, Marlborough and Poole; the urban districts of Biddulph, Blackrod, Farnham, Felixstowe, Feltham, Hornchurch, Nantwich, Petersfield, Skipton, Staines, Walton and Weybridge; and in the rural districts of Chard, Congleton, Huntingdon, Lancaster, Louth and Ware. SLAUGHTER OF ANIMALS (PREVENTION OF CRUELTY) REGULATIONS (APPOINTED DAY—NO. 2) ORDER, 1960 (S.I. No. 1540) (3d.).

Food and Drugs

The principal Regulations provided for the deferment of certain requirements relating to the construction, layout and equipment of existing slaughterhouses until such later dates as the Minister might appoint. This Order specifies the date, October 1, 1960, on which such provisions shall come into operation in certain local authority areas specified in the Schedule. SLAUGHTERHOUSES (HYGIENE) REGULATIONS (APPOINTED DAY—NO. 2) ORDER, 1960.

The Food Hygiene Regulations, 1955 to 1957 (S.I. 1955, No. 1906; 1956, Nos. 938, 1984; 1957, No. 2157) are consolidated and amended and extended to food businesses carried on from home-going ships and moored vessels. The other principal changes are (1) the extension of the definition of the handling of food to include the cleaning of food utensils and equipment; (2) the relaxation in some respects of regulation 25 of the 1955 Regulations, which deals with the temperature at which foods are to be kept on catering premises; (3) the modification of regulation 29 of the 1955 Regulations to permit the transport of certain types of offal without being put in special containers; (4) the person carrying on the food business is principally responsible for securing compliance with the regulations, but a manager or foreman is also required to take all reasonable steps to secure compliance by the food handlers under his control. The regulations lay down requirements in respect of (1) the cleanliness of premises, ships, stalls, vehicles, etc., used for the purposes of the food business and of apparatus and equipment used for those purposes; (2) the hygienic handling of food; (3) the cleanliness of persons engaged in handling food; (4) the construction of premises and ships used for the purposes of a food business and the repair and maintenance of such premises and of ships, stalls, vehicles, etc.; (5) sanitary conveniences and the provision of a water supply and washing facilities; (6) the temperature at which certain foods which are particularly liable to transmit disease are to be kept on catering premises. Operative October 1, 1960, save in relation to ships for which the operative date is postponed to November 1, 1961, to give time for any necessary structural alterations to be carried out. Local authorities and port authorities responsible for enforcement of the regulations are empowered to give certificates of exemption where, due to exceptional circumstances, this is required. There is an appeal to a magistrates' court against the refusal or withdrawal of a certificate. FOOD HYGIENE (GENERAL) REGULATIONS, 1960 (S.I. No. 1601) (9d.).

For penalties for contraventions see Regulation 34 of these Regulations.

Regulations following the same pattern as the General Regulations (S.I. No. 1601) referred to above prescribe requirements to secure the hygienic handling of food at docks, warehouses, cold stores, carriers' premises and a number of other special types of premises which were excluded from the ambit of the Food Hygiene Regulations, 1955. Part II of these Regulations require that places, vessels and vehicles used for the reception or movement of food are made available in a clean condition and kept in that condition by the persons using them. Part III contains requirements as to the cleanliness of workers handling food which is not completely protected by its packing. Part IV contains requirements as to the construction, maintenance and repair of premises, and as to sanitary conveniences and the provisions of a water supply and washing facilities. Part V contains administrative provisions and deals with the granting of exemption certificates from the requirements as to the provision of a water supply and washing facilities if through special circumstances compliance cannot reasonably be required. There is an appeal to a magistrates' court against the refusal or withdrawal of a certificate. Operative November 1, 1960. FOOD HYGIENE (DOCKS, CARRIERS, ETC.) REGULATIONS, 1960 (S.I. No. 1602) (6d.).

For penalties for contraventions see regulation 25 of these Regulations.

London Traffic

Additional parking places with parking meters are authorised in the Borough of St. Marylebone. The location of these parking places is described in the Schedule, and the Order provides for the times and days during which the parking places are to be in operation, the periods for which the vehicle may be left there, the type of vehicles which may be parked there, the charges which the Borough Council are empowered to make, and the general operation of the parking places. Operative for preliminary purposes to enable the Council to acquire the sites and carry out works, August 27, 1960, and for all other purposes on November 28, 1960. PARKING PLACES (ST. MARYLEBONE) (NO. 1) ORDER, 1960 (S.I. No. 1524) (1s. 3d.).

The following Orders have been made detailing prescribed routes: S.I. Nos. 1303 (Wandsworth) (2d.); 1484 (St. Albans) (3d.); 1636 (Deptford) (2d.).

The following Order has been made prohibiting waiting: S.I. No. 1485 (various main routes in Middlesex and Surrey) (3d.).

A speed limit of 50 m.p.h. is imposed on the driving of mechanically propelled vehicles on certain lengths of trunk road in the London Traffic Area, specified in the Schedule. Operative July 29, 1960. LONDON TRAFFIC (50 m.p.h. SPEED LIMIT) (NO. 2) REGULATIONS, 1960 (S.I. No. 1198) (3d.).

Magistrates' Courts

Amendments are made to the Magistrates' Court Rules, 1952 (S.I. 1952, No. 2190), as follows: Rule 10A (notices on committal of person subject to transfer direction) added as a new rule; Rule 20A (committal to quarter sessions for order restricting discharge, etc.) added as a new rule; Rule 25A (notice or further remand) added as a new rule; Rule 28 (documents to be sent under Mental Health Act, 1959) substituted for old rule; Rule 58 (notice of appeal in respect of a hospital order or guardianship order), former rule amended. Forms 15A, 37A, 37B and 37C are added, and Forms 30, 31 and 95 are substituted. Operative November 1, 1960. MAGISTRATES' COURTS RULES, 1960 (S.I. No. 1431) (6d.).

The following Order has been made in respect of petty sessional divisions: S.I. No. 1641 (Lancashire) (3d.).

Pest Control

The principal Order (S.I. 1958, No. 1814) is amended by empowering an authorised officer of the Ministry of Agriculture, Fisheries and Food to treat, remove or destroy trees infected with fire blight disease without first requiring the occupier of the land on which the trees are growing himself to take the necessary steps. Operative September 1, 1960. FIRE BLIGHT DISEASE (AMENDMENT) ORDER, 1960 (S.I. No. 1557) (3d.).

Police

The functions which traffic wardens may be employed to discharge in England and Wales, under these regulations made under section 2 of the Road Traffic and Roads Improvement Act, 1960, are (1) to enforce the law with respect to certain parking and lighting offences specified in the Schedule; (2) to operate the fixed penalty procedure under section 1 of the Act in relation to some of those offences; (3) to act as parking attendants at street parking places provided or controlled by the Minister of Transport and to exercise the functions conferred on traffic wardens at street parking places by designation orders (which relate to parking meter zones) and (4) to operate school-crossing patrols. Operative September 15, 1960. FUNCTIONS OF TRAFFIC WARDENS ORDER, 1960 (S.I. No. 1582) (3d.).

The Police Regulations, 1952 (S.I. No. 1704), as amended, are further amended by enabling a police officer who does duty on a public holiday, or on a rest day, to include in his period of duty the time taken in travelling to and from his place of duty (in so far as the time taken and the period of duty do not exceed four hours) for the purpose of calculating his time off or the allowance in lieu. Operative September 15, 1960. POLICE REGULATIONS, 1960 (S.I. No. 1605) (2d.).

Probation

The Probation Rules, 1949, are amended. Rule 1 lowers the minimum age of appointment from 23 to 22 and enables a person who has reached 40 to be appointed a whole-time probation officer if a body approved by the Secretary of State has on the application of the appointing authority declared him suitable for admission to a course of training in the duties of probation officers. Rule 2 enables the service of any probation officer to be extended beyond the age of 65 (which is the age of compulsory retirement) by agreement between the probation officer and the employing authority. Rule 3 enables a probation committee with the approval of the Secretary of State to contribute to the expenses of a national association of probation committees. Operative August 15, 1960. PROBATION RULES, 1960 (S.I. No. 1443) (3d.).

Increased scales of salary for whole-time probation officers and an increased London addition came into effect on August 1, 1960. PROBATION (CONDITIONS OF SERVICE) (NO. 2) RULES, 1960 (S.I. No. 1538) (3d.).

Public Service Vehicles

The Order of 1934 (S.R. & O. 1934, No. 95) which makes provision as to the particulars required to be supplied to traffic commissioners by the applicant for a road service licence, is revoked and replaced without change of substance in order to make such verbal amendments as arise from the consolidation of the Road Traffic Act, 1930, by the Road Traffic Act, 1960, operative September 1, 1960. PUBLIC SERVICE VEHICLES (PARTICULARS OF INTERESTS) REGULATIONS, 1960 (S.I. No. 1506) (3d.).

Scotland

The Police (Scotland) Regulations, 1956 (S.I. No. 1999) are amended (1) in respect of the definition of a tour of night duty for the purpose of computing overtime where a police officer is recalled to duty within a period of 9½ hours immediately following the completion of such night duty; and (2) by enabling a police officer who does duty on a public holiday, or on a rest day, to include in his period of duty the time taken in travelling to and from the place of duty (in so far as the time taken in travelling and the period of duty do not exceed 4 hours) for the purpose of calculating his time off or the allowance in lieu. Operative September 15, 1960. POLICE (SCOTLAND) AMENDMENT (NO. 2) REGULATIONS, 1960 (S.I. No. 1622) (3d.).

Theatre and Cinematograph

The Cinematograph Films Acts, 1938 to 1960 have been consolidated by the FILMS ACT, 1960 (8 & 9 Eliz. 2, c. 57). The Act becomes operative on January 1, 1961.

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 11 New Fetter Lane, London, E.C.4." The questions of readers only are answerable in the Review. All questions should be submitted in triplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

72. *Presumption of legitimacy of a child born less than nine months after the marriage of its mother*

In reading for a LL.B. degree I learnt that there is a presumption of law that a man who marries a woman knowing her to be pregnant is the father of her child. The question is whether this rule of law has any application to the criminal law. Particularly in incest where paternity is an essential ingredient. When a man marries a woman who is, for example, six months pregnant and years later commits incest with the child, does the presumption apply, or must there be strict proof of paternity? Usually the woman herself might prove the paternity, but if the woman was dead the means of proof would not be available. [J. H.]

ANSWER

It appears from dicta in *R.* v. *Luffe* (1807) 8 East 193, that the reason behind the presumption of legitimacy of a child born less than nine months after the marriage of its mother, is that the husband, knowing of the pregnancy, acknowledges that the child is his by marrying the mother. Such a presumption is rebuttable by proof of infirmity or non-access and, of course, the basis of the presumption disappears if it is shown that the husband did not know of the pregnancy at the time of the marriage. (See also *Poulett Peerage Case* [1903] A.C. 395.)

The strength of the presumption will obviously vary with the facts, but if a man marries a woman who is six months pregnant, a very strong inference that he knew of her state will arise, and will give rise to the further inference that he was the father of the child. Unless reasonably cogent evidence that he did not have intercourse with the wife prior to the marriage is given, there seems no reason why the mere birth of a child three months or less after marriage should not be sufficient proof of paternity, even in an incest case. The act of marrying a woman patently pregnant can be considered as in the nature of an admission by the accused. [D. W. E.]

Letters to the Editor

Punishment by Imprisonment

Sir,

Do your learned contributors consider that a directive should be given from the Judicial Bench to the two courts dealing with the majority of criminal matters, namely, quarter sessions and magistrates' courts, on the approach to punishment by imprisonment. I do not know if statistical tables are available on the point to which I would like to draw attention, but I do know of instances where courts of quarter sessions make probation orders in cases sent to them by magistrates' courts under the provisions of section 29 of the Magistrates' Courts Act, 1952. What is there to query in this one may ask. The reason why a magistrates' court sends a convicted defendant for sentence is because they are of opinion, in their wisdom and experience, that greater punishment should be inflicted than they have power to inflict, the maximum period possible being twelve months when two charges dealt with summarily are involved. It is surely a matter of concern when the defendant appears at quarter sessions on such a committal that a completely different attitude to his offences is expressed. Can there be two views capable of juridical approval in respect of the defendant? The magistrates or quarter sessions were correct. What is surely required is some guidance to the lay Bench so that the disparity between their appreciation of what is a proper punishment and the view of quarter sessions does not lead the mind of the public to consider the " harshness " of the magistrates or the " softness " of the court of quarter sessions.

The suppression of crime I understand is considered to be effected by the sure belief of an offender that he will be detected and appropriately punished. Detection involves the adequacy of the Police Forces and the social education of the public. Punishment is a matter for the trained minds of the judiciary. However, the well-known principle that " Justice must not only be done but must manifestly be seen to be done " does not I think apply only to procedural matters.

" MARINE."

Books and Periodicals

Gentlemen of the Law. By Michael Birks. London: Stevens & Sons, Ltd. 1960. xi and 304 pp. incl. index. 25s. net.

The Holy Roman Empire has been said to be neither holy, Roman nor an empire. Similarly, in *Gentlemen of the Law* Mr. Birks may be said to show that solicitors have not always been gentlemen nor even primarily concerned with the law. It is not surprising that the attention of historians has focused on the evolution of the common law itself and on those mainly concerned in its development; judges and barristers who featured in the constant drama of the courts. What is surprising is that no comprehensive study at all should have been devoted to the history of solicitors. *Gentlemen of the Law* goes much of the way to fill that gap.

Mr. Birks avows in his preface a preference for the individual to the group and this is apparent in his use of the sources. For the early period he relies on the Year Books, illustrating the development of the attorney from the courts' first grudging recognition of him as little more than an intruder authorised to conduct an individual suit on behalf of another to their ultimate recognition of him as a professional lawyer as necessary to the initiation of litigation as the barrister to its conclusion. The writing of history from single instances is inevitable when materials are few and Mr. Birks' treatment of this period is, on the whole, admirable. He shows how the conditions of the times, difficulties of travel and the general ignorance of legal and business affairs, necessarily led to the development of a separate branch of the legal profession, intermediary between the layman and the expert in substantive and procedural law. He also shows how the law, as created by the judges and the court officials, adapted itself to recognise the activities of this branch. The cases quoted not only show most clearly the stages of the early development but also the vicissitudes which beset a profession which has never been without its less reputable members even, or perhaps particularly, in its formative years. This is by far the most valuable part of the book though, as an historian, Mr. Birks is at times uncritical. His statements about the source of the Year Books and the expression " outer barrister " ignore the variety of explanations which have been put forward about these subjects.

A particularly valuable chapter is that dealing with scriveners. The efforts of this class to retain a monopoly of their craft in the face of growing literacy makes depressing, but all too familiar, reading. We have yet to find a solution to the problem of how to do justice to members of a trade or profession who have once given useful service but whom changing times render increasingly less necessary. From a lawyer's point of view, however, the more interesting aspect is the importance and value of paper itself. It throws light on the importance attached in medieval law, and later, to a writing and it would provide a point of departure for an interesting sidelight on the growth of the law of contract.

For the middle period Mr. Birks' method is less happy. He has assembled some valuable material on the lives of a number of individual lawyers. The very vividness of this material, however, throws into lower key the history of the profession as a whole. Mr. Birks is not at his best in giving flesh to statistics. The broad outlines are there; the development from the general man of affairs and small banker to the man of law as we know him today; from the days when the work involved exhausting travel to the more stable state of affairs that better communications made possible; but the details are arbitrarily selected. This is a disadvantage to have to deal with a profession the changes in whose way of life cannot be signposted in the same way that mechanical inventions make possible in other crafts. There is no steam engine or spinning jenny in the law. But even the changes that were taking place are not given any prominence. Foreign trade and the customs of merchants involved in it brought great developments in the law of contract but this aspect of life, which must have had importance for solicitors, is given no mention.

For the modern period, the nineteenth and twentieth centuries, Mr. Birks has put in a great deal of research. To resist the temptation to make any substantial reference to the changes in the substantive law, as he has done, lays Mr. Birks a little open to the charge that his story is Hamlet without the prince. But he is clearly right. It is largely true to say that solicitors as a class have not played an important part in law reform and the steps they took to reform their own profession sufficiently rounds off this history. That reform was needed Mr. Birks makes abundantly clear, if we did not already have the, perhaps prejudiced, unanimous judgment of literature to tell us so. The profession is entitled, however, to take more credit than it does for having put its own house in order as Mr. Birks' careful research so clearly shows. Having described the development of professional ethics from within and the success of the profession in securing proper remuneration for their services it is a little disappointing that he does not make rather more of the attractions of the profession or the real value of its services. It is true he is writing history and not an apologia. Nonetheless these chapters leave an impression that, having taken the courageous and valuable step of setting its house in order, the profession has since then been concerned with fees, the admission of women, the size of the profession and office accommodation rather than with an examination of the value of the services it provides and whether these services are best suited to the needs of the public. Mr. Birks makes it clear that leading solicitors are concerned that the ingrained conservatism of the lawyer is doing him a disservice today. If the picture he paints is true, however, and it is permissible to question whether he is not unduly pessimistic, the profession needs to give most serious consideration to what changes are necessary to adjust itself to the conditions of the welfare state.

In these closing chapters Mr. Birks' account is coloured by his own views and the objectivity of the earlier part is lost. There is some confusion between what is and what ought to be, and Mr. Birks does not seem sufficiently clear in his mind about what should be the future of the profession for this switch to a subjective approach to add to the value of the book. This is a pity for it results in an unsatisfactory conclusion to what is otherwise a most promising achievement.

G. DE DENEY.

Books received:

English Courts of Law. By H. G. Hanbury, Q.C., D.C.L. Third edition. London: Oxford University Press. 1960. 185 and (bibliography and index) 9 pp. 8s. 6d.

Readers' digest:

Homicide: Criminal responsibility—based on *D. P. P.* v. *Smith*: 110 *Law Journal* 631.

Police: The police and the public: 124 *Justice of the Peace* 636.

Procedure: Recalling witnesses in criminal trials: 1960 *Scots Law Times* 161.

Road Traffic: Careless and dangerous driving: 124 *Justice of the Peace* 638.

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Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review*, 11 *New Fetter Lane, E.C.*4. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

THE
CRIMINAL LAW
REVIEW

December 1960

" Justice "

The greater part of this issue is taken up with a report on Preliminary Investigations prepared by a committee of *Justice*, the British section of the International Commission of Jurists, as we feel that this is a major contribution to efforts to improve criminal justice. This is their third annual report, and is to be submitted to the Royal Commission on the Police. The members of the Committee were F. H. Lawton, Q.C., Chairman, John Foster, Q.C., M.P., Peter Rawlinson, Q.C., M.P., Norman Marsh, J. E. H. Williams, Philip Kimber, Peter Bennenson, H. Abraham Barrow, Jean Graham Hall, and C. R. Hewitt. The secretary to the Committee was Mr. Alec Grant.

The report makes a number of recommendations with regard to the problems attendant upon " the law and practice of the examination of persons liable to be charged with criminal offences. . . . " and these deserve very careful consideration as too does the dissenting opinion of Mr. John Foster, Q.C., printed at the end of the report. We doubt whether all the recommendations should be adopted and would ourselves suggest that the accused would obtain sufficient protection from other recommendations without adopting the fourth (putting character in issue). We shall be pleased to publish the views of our readers on this report.

We hope that the Royal Commission will be able to consider this report and that their terms of reference will not be too inhibiting.[1]

Penal Reform

This month has seen the publication of three important reports and the Criminal Justice Bill. Two of the reports, the findings of the Ingleby Committee, and the Criminal Law Revision Committee on Suicide, are considered below. We have not had sufficient time to consider the report of the Advisory Council on the Treatment of Offenders on Corporal Punishment.[2] The chief recommendation is that '. . . corporal punishment should not be re-introduced as a judicial penalty in respect of any categories of offences or offenders." The Criminal Justice Bill is based on the recommendations made in reports of the Advisory Council, the Ingleby Committee, and the report of the inquiry into the disturbances at the Carlton Approved School. A further consideration will be given to this at a future date.

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[1] See p. 73 (February issue).

The Report of the Criminal Law Revision Committee on Suicide [3]

The Home Secretary asked the Criminal Law Revision Committee to consider what amendments in the criminal law would be required on the assumptions that (a) suicide and attempted suicide would cease to be criminal offences; and (b) it would continue to be an offence to incite or assist another to commit or attempt to commit suicide.

The Committee's main suggestion is that the offence of aiding, abetting, counselling or procuring the suicide of another, or an attempt by another to commit suicide, should be an indictable offence punishable by imprisonment for a maximum of fourteen years; and the draft Bill annexed to the report is worded accordingly.

It is not clear whether the wording of the proposed amendment covers the case of an inciting to commit suicide not followed by an actual suicide or attempt. The words " counselling or procuring " are used; but these words normally describe the acts of one who is an accessory before the fact to an offence actually committed. Even " counselling " alone can hardly mean inciting here, for the relevant words are " . . . counselling . . . suicide . . . or an attempt . . . to commit suicide "; and how can one incite another to attempt to do a thing? If, then, " counselling or procuring " do not include inciting, the result of the draft Bill would be that inciting another to commit suicide would cease to be an offence, for it is no offence to incite the commission of an act that is not itself an offence. This result is contrary to the Committee's terms of reference referred to above.

On the other hand, if " counselling " is intended to mean a mere inciting (in which case the point should be clarified in the resultant statute), another anomaly arises. Inciting another to commit suicide would be punishable by imprisonment for fourteen years, while inciting murder is a misdemeanour with a maximum sentence of ten years (Offences against the Person Act, 1861, s. 4). This result would be surprising.

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[2] Cmnd. 1213.

[3] Cmnd. 1187.

The Ingleby Committee on Children and Young Persons

The Committee appointed in 1956 under the chairmanship of Viscount Ingleby has now reported,[4] and its recommendations have already been so widely publicised that they do not call for summary here.

It appears, however, that one of the Committee's major recommendations has been misunderstood in some quarters. The suggestion that the minimum age of criminal responsibility should be raised to twelve does not mean that a child under that age could not in an appropriate case be punished for his delinquencies —though the Committee finds the distinction between punishment and treatment difficult and unreal. The reforms suggested affect the form and approach, but not substantially the effect, of proceedings involving younger children. ("The change we recommend," says the Committee, " is essentially one of procedure, though none the less important on that score.") What is contemplated is that children under twelve brought before the juvenile courts should form a single class of children alleged to be " in need of protection or discipline " (a description to be shared with those over twelve who have hitherto been described as being in need of care or protection or beyond control). The single classification reflects the view that young children in need of care or protection and young delinquents alike require to be studied in the light of their environment and development, and that the problems of treatment and training are common to them all. The contemplated procedure (and this is true of cases involving older children also) would entail a greater degree of compulsory participation on the part of both parents than exists at present. But while the Committee rightly stresses the importance of family life and parental responsibility, the methods of dealing with young children proved to have committed offences are to be in no way reduced. Indeed, they will be increased if Parliament adopts the Committee's suggestion that the court should be able to order a child over ten to attend at an attendance centre—at present the minimum age for such attendance is twelve.

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[4] Cmnd. 1191.

Medicine, Science and the Law

This month we welcome the first issue of a new publication, *Medicine, Science and the Law*, the official journal of the British Academy of Forensic Sciences. When the Academy was founded in 1959, with Dr. Radzinowicz as its first President, its objects were said to be to "encourage the study, improve the practice and advance the knowledge of the forensic sciences, special emphasis being laid upon Research and Education." The aim of this journal, as stated in the editorial, is to further the objects of the Acamedy by publishing suitable material of a high standard. The journal's name is taken from the three sections of the Academy and each quarter it will be devoted to articles addressed to all those interested in medicine, science and the law. Each issue will include important articles giving details of original research work and of new developments in the scientific and medical fields.

This first issue includes a paper by Dr. Radzinowicz on criminal law, criminology and forensic science. H. A. Sissons, in a paper entitled Facilities for Post Mortem Examinations, provides disturbing evidence of the kind of conditions which prevail in some mortuaries in this country. Dr. Glanville Williams has contributed a provocative article on Diminished Responsibility, a subject of first importance at the present time. A biography of Milton Helpern, M.D., is the first of a series of articles on famous forensic scientists by Dr. Richard Myers of Los Angeles. Other articles in this issue include Isolated Myocarditis as a Cause of Sudden Obscure Death, by Dr. Colin Corby and Investigation of Skeletal Remains of a Known Population by Dr. F. L. B. Steel.

Permanent features of the journal will incude law for the scientist, a digest of cases, statutes and orders, specially prepared by lawyers for doctors and scientists.

If this journal maintains the very high standard it has set in its first issue, it will make a vital contribution to the three fields of study with which it deals.

Judicial appointments

Arthur Brian Boyle, Esq., C.B.E., Q.C., has been appointed to be Recorder of the Borough of Sunderland.

Preliminary Investigations of Criminal Offences

THE REPORT OF A COMMITTEE APPOINTED BY JUSTICE

1. A criticism commonly made of the present system of English criminal justice is that it contains insufficient safeguards to protect suspected persons from unfair and oppressive treatment by the police. Another criticism of the system is that it too readily assists the acquittal of the guilty.[1] Both kinds of criticism are serious. It is an injustice if an innocent man is convicted. It is equally unjust if a guilty criminal is acquitted. There would be no merit in a system which habitually committed one kind of injustice in order to avoid the other. Justice requires the guilty to be convicted and the innocent to be acquitted.

2. A fundamental principle of criminal justice in this country and in many others is that " no man shall be compelled to incriminate himself." This principle, with some exceptions, is applied by English law to the various stages of criminal investigation and to the trial of accused persons. The rule was first formulated in England in the sixteenth century, and has been so long enshrined in our system of justice that many regard it as a self-evident truth. But it has had its critics. Bentham described the principle as " one of the most pernicious and most irrational notions that ever found its way into the human mind." We shall examine the stages of criminal investigation and criminal trials, and consider in relation to each stage first whether the principle ought to be applied at all, secondly, whether it is applied at present, and thirdly, what reforms are necessary if it is to be applied.

INVESTIGATION OF OFFENCES BY THE POLICE

3. In 1847 an anonymous writer made the following comment in the *Law Review* (Vol. VII, p. 22) on the investigation of offences by the police:

> " It must never be forgotten that an inquiry of this kind is conducted by power against weakness, by society against an individual, by a person skilled in the art of examining and perfectly collected at the time against a person unskilled and

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[1] See, for instance, Glanville Williams, *The Proof of Guilt* (1955), p. 15.

> frequently confused by terror, by a person at large against a person in custody, and in short that every advantage is on the side of the interrogator and every disadvantage on the side of the examinant."

In 1960 the balance of power between examiner and examinee is not always so heavily weighted. Intelligent or hardened criminals are not always " weak " or " unskilled " or " confused by terror." But it is still true in general that police officers have a psychological advantage and an advantage in numbers over the person they are questioning. This is so particularly when the questioning takes place at a police station, whether or not the person being questioned is in custody. In order to prevent investigations from becoming unfair or oppressive, it is necessary to provide safeguards. At the same time one has to remember that in most cases the person who can give the information which will ensure that justice is done is the suspected person himself. Safeguards need to be more or less elaborate according to the advantages possessed by the police at particular stages of an investigation. The rules applicable to the initial stage of an investigation need be less elaborate than those applied to the stage when the person questioned is or believes himself to be in custody.

The initial stage of investigation

4. By the "initial stage of investigation" we mean all questioning of a person by the police before he is taken or comes to a police station. This stage of the investigation may include questioning of a person at the scene of and immediately after the commission of a crime; visits by police officers to a person at his home or place of work; and conversations between officers and a person on the way to a police station. We exclude from this stage questions asked of or statements made by a person after a police officer has made up his mind to charge him with a crime. These questions and statements can be more conveniently considered together with the police station stage of the investigation.

5. Under the present law there is no restriction on the questions a police officer may put during the initial stage of investigation. Rule 1 of the Judges' Rules summarises the position:

> " Where a police officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information can be obtained."

At common law the person who is questioned is under no duty to answer. Save for one obsolescent exception,[2] no one is obliged to give information to the police. If a man positively knew that a felony had been committed and refused to give the police any information about it, he might be guilty of misprision of felony. There are, however, several statutory exceptions to the rule that no one is under a duty to answer questions.[3] The number of these statutory exceptions has increased in recent years. Great caution should be exercised in adding further to the list. The statements made during this stage of the investigation by a person who is afterwards accused are admissible in evidence, subject to the rule that a confession induced by any threat or promise of favour is inadmissible.

6. We would not favour any restriction upon the liberty of police officers to ask questions during this initial stage of the proceedings. Restrictions of this kind would hamper the police in their task of detecting crime, and such benefits, if any, as accrue to the innocent, would be dwarfed by the harm done to the public.

7. Statements made during the initial stage of investigation by persons who are afterwards accused are often valuable pieces of evidence. Subject to certain safeguards these statements should be admissible in evidence at the trial of the person who made them. The existing rule about the inadmissibility of confessions induced by threat or promises is one important safeguard, but it is our view that another is needed. Where the statement is made orally the police officer or officers present should make a written note of it at the time it is made or as soon as practicable afterwards. If a person who has made a statement, whether oral or written, is subsequently accused of a crime in connection with which the statement was made, he should be served with a copy of his statement as soon as practicable after he has been charged or summonsed. He should not be served while in police custody, though there would be no objection to service while in the custody of the prison authorities who will give him an opportunity for reflection and for taking legal advice if he so desires.

The copy served should be endorsed with a notice in some such terms as these:

> " At your trial the prosecution will allege that you made statement(s) as follows—

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[2] *R.* v. *Aberg* [1943] 1 All E.R. 601; *R.* v. *Wilde* [1960] Crim.L.R. 116.

[3] *e.g.*, Official Secrets Act, 1911, s. 7; Official Secrets Act, 1920, s. 6; Road Traffic Act, 1930, s. 22; Road Traffic Act, 1930, s. 113 (3). *Cf.* Explosives Act, 1875, s. 66 (3); Explosive Substances Act, 1883, s. 6; Bankruptcy Act, 1914, ss. 15 and 25; Companies Act, 1948, s. 270 (5).

Date, Time and Place	*By word of mouth or in writing*	*Words alleged to have been used*

> Read carefully what it is alleged you spoke or wrote. If you do not admit saying or writing what is alleged, inform the station officer at . . . police station as soon as possible, setting out what you do not admit saying or writing. If you have a solicitor or intend to consult one, show this notice to him and get his advice before deciding what to do."

Failure to observe this rule should render the statement inadmissible. Failure to take reasonable steps to effect service promptly should in any event be a ground for excluding the statement from evidence.

8. Our reasons for the recommendations which we have made in paragraph 7 are as follows:

(a) There is reason to believe that statements recorded by the police as " verbatim reports " of confessions by accused persons are not in fact in the words used by the accused. It is the rule rather than the exception to find such reports in the jargon so often used by the police rather than in the language normally used by persons of the status of the accused. A " verbatim " report of a statement which the accused has made while under examination for four hours will be recorded on a single sheet of foolscap. The recommendation of the Royal Commission on Police Powers[4] that the police questions should be written and answers follow in the words of the accused is not carried out.

(b) Statements are from time to time taken by the police in the small hours of the morning, at a time when the accused, having been summoned from his bed and being outnumbered by the police, and often a little frightened, is not in a fit condition to do himself justice. A frightened man will often tell a story which is untrue either because he feels it will " sound better " or for reasons unrelated to the alleged crime (*e.g.*, so that a girl friend shall not be questioned or involved).

(c) It frequently happens that an accused person will instruct his defending lawyers to challenge the accuracy of the police in the evidence they give as to a confession by him. In the words of the world of crime the police are accused of "putting on the verbals" or of reporting statements of the accused in a wholly misleading manner. Thus a police officer may tell the jury: "I called at the house of the accused and I said, 'I have reason to believe that you were concerned in a housebreaking at No. X, Y Street on the 5th October' and he replied, 'Who shopped me?'" The effect of this upon the jury may well be fatal to the accused, since they may feel that no innocent man would say, in effect "Who reported me to you?" But if in fact the police officer had said to the accused, "Come along now; you're for the nick; someone's shopped you over that job in Y Street," an innocent person may well have replied in astonishment, "Tell me who it is that you say has shopped me."

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[4] (1929) Vol. 9. Cmd. 3297. Royal Commission. Paras. 88, 89, 90 and 91. The Report of the Commission refers, in a footnote, to an Article published in *The Justice of the Peace*, Vol. XCII, p. 792.

> " The Police method has its advantages and its disadvantages. It produces a concise and readable narrative that is easily followed by those who will have to read it and consider it as a basis of action. It has the vice of all narratives, the loss of some of the essential truth of the story, because truth is many-sided and complex, not successfully to be run into a mould of rather stilted language."

(d) Some accused persons go further and allege that, there being a black sheep in every fold, there are police officers who will put into the mouth of the accused words which tend to incriminate him and which he never uttered.

(e) It is impossible for us to judge whether or no there be any substance behind paragraphs (c) and (d) above, but it is fair to say that allegations of this kind are very frequently made and that they come not only from clients of the "criminal classes" but also from persons of a different class who find themselves in conflict with the police—for example motorists.

(f) In these circumstances we feel that it is fair to the police that, where an alleged confession is to be challenged, they shall have notice of the intention of the accused to challenge it; and it is fair to the accused that he shall be informed in writing of what the police are going to say he has said and that, after taking legal advice, he shall without fear be able to correct any misunderstanding.

(g) At present it is the practice of some police forces to supply on request copies of statements to the solicitor of an accused person who is legally represented. An unrepresented person should not be in a worse position than one who employs a solicitor. The practice should be made uniform and obligatory.

(h) Unfairness may result at present when an accused is faced at his trial with a written record of an oral statement which he may have made several months or even years earlier. If he wishes to challenge the accuracy of the written record, he and his legal advisers are at a serious disadvantage if he has not seen it until the trial or preliminary inquiry. This difficulty arises in an acute form in cases of fraud, where the subject-matter of the statement may be complex. The problem is not completely solved by serving a copy of the record of the statement on an accused after he has been charged. In such cases there may be a long lapse of time between the making of the statement and the preferment of the charge. The court should therefore exclude any evidence of statements made so long ago that a man may not reasonably be expected, in all the circumstances, to be able to contradict them.

9. A possible defect in the practice of serving copies of statements on accused persons is that injustice may result to illiterate or stupid people. A man of average intelligence and literacy is likely to challenge an inaccurate record immediately it is served upon him. An illiterate or stupid person is unlikely to do so. Failure to challenge the record at the time of service may weaken his case if he contends at his trial that the record is inaccurate. But the advantage of serving copies of statements justifies this risk. In any event the court should take into account the intelligence and standard of literacy of an accused.

10. An additional safeguard is the practice of asking the person who has made an oral statement to sign the note made by the police officer conducting the interview. This practice is employed by several police forces in England, but only occasionally by the Metropolitan Police. Although counter-signature of the investigating officer's notebook may sometimes be a useful safeguard, we do not suggest that police officers should be compelled to follow this practice. The production of a notebook during an interview may often induce silence in one who would otherwise volunteer valuable information and perhaps establish his own innocence.

11. We do not suggest that service of a copy of the record and counter-signature of the investigating officer's notebook will resolve all the difficulties which arise. These practices will not save police officers from being unjustly accused of perjury, nor will they prevent police officers from fabricating evidence. They would, however, assist the courts in determining the truth of such allegations. A person who accepted service of a record of his statement without subsequent comment, would have difficulty in challenging successfully the accuracy of that record or note. A person who had protested would be in a stronger position. A person who counter-signs the investigating officer's notebook is not in a strong position to challenge the accuracy of the note, though a weak, tired or frightened person will sign almost anything and, after reflection, deny its accuracy.

12. Under the present law, a man with a criminal record is at a particular disadvantage if he challenges in court the accuracy of the record of his oral statement. If he tries to discredit the evidence called for the prosecution by alleging that the record of his statement is a concoction, the prosecution is entitled to retaliate by

referring to his own bad character. This is a seemingly just rule, because the court ought to know the character of a person who makes allegations of perjury. The rule may sometimes have the effect, however, of preventing true allegations of perjury from being made. We think justice would best be done by not applying the rule in cases where the admissibility or accuracy of statements alleged to amount to confessions is in issue.

13. We do not favour the view which is frequently canvassed that statements made during the initial stage of investigation should be inadmissible in evidence unless made in the presence of an independent person. Admissions are sometimes made voluntarily by accused persons at the scene of the crime and at or about the time of arrest. In these circumstances no independent person can be present. It would not be in the interests of justice to exclude every statement voluntarily made in these and similar circumstances.

14. The only reservation we would make to this conclusion is that it is undesirable that a child [5] should be questioned alone. This may be inevitable when the questioning takes place at the scene, and at the time, of the crime of which he is later accused. Only in these circumstances should a voluntary statement made by a child in the absence of his parent or guardian be admissible in evidence. Otherwise questioning of a child should take place in the presence of his parent or guardian, and statements made in answer to questions should not be admissible in evidence if this requirement is not complied with. Where the parents or guardian cannot be found, or cannot or refuse to be present, or are alleged to be implicated in the offence, the questioning should be done in the presence of the Children's Officer of the local authority or a person, other than a police officer, nominated by him.

15. The use of tape recorders is discussed under the heading of the police station stage of investigation.[6] For the reasons there set out we do not think it practicable at the present time to use these machines to record oral statements.

The " police station stage " of investigation

16. By the " police station stage " of investigation we mean all questioning of a person by the police after a police officer has made up his mind to institute proceedings against him for a criminal offence, whether by charge or summons, and all questioning of a person by the police in a police station whether or not the

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[5] *i.e.*, a person under the age of fourteen years: Children and Young Persons Act, 1933, s. 107 (1). This age may be amended following the recommendations of the Ingleby Committee.

[6] See para. 30

person questioned is in custody and before and after the investigating officer has formed the intention to prefer a charge.

17. The law and rules of practice which at present apply to questioning in this stage up to the time when a police officer makes up his mind to charge the person questioned are the same as those which apply during the initial stage of investigation.[7] From that moment onwards, however, restrictions on the conduct of interrogation are made by the Judges' Rules. The relevant rules are:

> "(2) Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking any questions, or any further questions, as the case may be.
>
> "(3) Persons in custody should not be questioned without the normal caution being first administered.
>
> "(4) If the prisoner wishes to volunteer any statement, the usual caution should be administered . . . " (the remainder of rule 4 and rule 5 deal with the form of caution).
>
> "(6) A statement made by a prisoner before there is time to caution him is not rendered inadmissible in evidence merely by reason of no caution having been given, but in such a case he should be cautioned as soon as possible.
>
> "(7) A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing an ambiguity in what he actually said. For instance, if he has mentioned an hour without saying whether it was morning or evening, or has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point" (rule 8 deals with the situation where statements are taken separately from two or more persons charged with the same offence).
>
> "(9) Any statement made in accordance with the above rules should, whenever possible, be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish."

An important rider was added to rule 3 by a statement made by the judges of the King's Bench Division in 1930. The statement said:

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[7] See para. 5.

> "This rule was never intended to encourage or authorise the questioning or cross-examining of a person in custody, after he has been cautioned, on the subject of the crime for which he is in custody, and, long before this rule was formulated, and since, it has been the practice for the judges not to allow any answer to a question so improperly put to be given in evidence, but in some cases it may be proper or necessary to put questions to a person in custody after the caution has been administered. For instance a person arrested for burglary may, before he is formally charged, say: 'I have hidden or thrown the property away,' and after caution he would properly be asked: 'Where have you hidden or thrown it?'"

The Judges' Rules are not part of the law of England. They are a code issued by the judges of the Queen's Bench Division for the guidance of the police and to which police officers are expected to conform. But the power of the judges to exclude, at their discretion, evidence which is unfair or prejudicial to the accused or which belongs to a class of evidence which is considered to be of prejudicial character, is a sanction against breach of the rules. Nevertheless judges can, and do, admit evidence which has been obtained in breach of the rules.[8] The rule of law that a confession induced by any threat or promise of favour is inadmissible in evidence applies in the police station stage in the same way as in the earlier stage of investigation.

18. How far do these rules of law in practice secure that justice is done? It is not our purpose to consider individual cases. We have no means of investigating particular allegations of injustice, and must confine our answers to broad principles. The Royal Commission on Police Powers[9] found in 1929 no creditable evidence of confessions being obtained by violence or the threat of violence; but they found a volume of responsible evidence which it was impossible to ignore suggesting the use of such devices for extracting statements as keeping a suspect in suspense (keeping him waiting for a long period), constant repetition of the same question, bluffing assertions that all the facts are known anyway, that a clean breast will enable them to make things easier at the trial and so on. They did not find that the police were disposed to press for the conviction of people whom they believed to be innocent, but there was a disposition occasionally to strain the evidence against someone genuinely believed to be guilty. We have found

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[8] *e.g., R.* v. *Voisin* [1918] 1 K.B. 531.

[9] 1929, Vol. 9. Cmd. 3297.

that many people concerned with the business of the criminal courts (members of the Bar, solicitors and experienced crime reporters) reach a broadly similar conclusion today. Perhaps the one major difference between the position in 1929 and in 1960 is that over the years the police have developed more ingenious and more effective techniques of interrogation.

19. What kinds of interrogation are objectionable, and what criteria should we use in judging different techniques of questioning? In this country torture is condemned as a means of interrogation. Objection to torture may be made on two grounds. First, torture may achieve an unjust end by inducing a false confession from an innocent man. Secondly, even where the victim of the torture is guilty and the end achieved is a just one, the means do not justify the end. These arguments can be adapted to the evaluation of other means of interrogation. Two questions should be asked about any particular technique. First, are the means employed objectionable in themselves? If the answer to this question is "yes," the technique stands condemned whether the results produced by it are just or unjust. If the means employed are not objectionable in themselves, one must go on to ask whether there is any danger that they may induce a false statement from the person under interrogation. Applying these criteria, all techniques of interrogation fall into three classes. First, those which should not be used at all because the means employed are objectionable. Secondly, those which may be used, but the statements made in answer to which should not be allowed in evidence, because there is a danger that the statements induced may be false. Thirdly, those techniques which may be used and the statements made in answer to which admitted in evidence, because there is no such danger.

20. We place in the first class (techniques which should not be used at all) any means of interrogation which involves the use of violence, whether the violence be physical or mental or a combination of both. We include in this category not only the use of direct force, but also questioning of prisoners who have been kept sleepless or hungry, and any questioning of prisoners who are physically exhausted. No practical purpose would be achieved by making an exhaustive set of laws or rules about ill treatment of persons in custody at, or invited to, police stations. These practices, if they exist, cannot be prohibited by legislation, but only by a uniformly high standard of conduct among the police. But in view of the variations between one police authority and another, it would be desirable for the Home Secretary to prepare and lay before

Parliament a basic code of conduct. The code should be designed to protect the person being interrogated against any unfair use of the modern psychological means of interrogation which are, we are given to understand, increasingly used by police forces all over the world.

Thus, the suspect should not be interrogated when he is suffering from lack of sleep or nourishment, or after being left alone and in a state of suspense for any substantial period of time. Since it is the feeling of being alone, in the presence of so many police, which tends to cause a suspect to agree with whatever is suggested to him, or to invent a story which destroys his credit, he should not be denied the means of communication (by telephone if available) with his solicitor, and if he requires that his solicitor be brought to the police station he shall not be pressed to talk before the solicitor arrives.

The police should not pretend that he is not free to leave the station if in fact he is not under arrest. The interrogation should not be continued for any long period (say two hours) without a break for refreshment and relief. He should, of course, be comfortably seated, as should all others who are present (*i.e.*, he should not be in an inferior position where those present are standing or behind him) and the lights should be so arranged that they do not shine into or near his eyes.

Psychological methods which involve treatment designed to produce phases of anxiety alternating with phases of relief are liable to lead to breaches of the Judges' Rules, and special care should be taken in preparing the code to prevent such breaches. Fear and acute tension can be produced by such expressions as " We know it all, and the sooner you come clean the sooner we all get to sleep: you know what happens to people who don't come clean: there are plenty of charges we can lay against you, and your girl friend." Relief can be induced by the kindly officer who says, " Don't you worry, sonny, it's your first offence and if you take it easy the sergeant will put in a good word for you, and the beak will probably bind you over."

21. In the second category of techniques of interrogation (those which may be used, but the statements made in answer to which should not be allowed in evidence) we place practices such as the prolonged questioning of persons in custody and questioning of a kind likely to bewilder, confuse or upset the normal mental processes of a prisoner. Some take the view that these techniques of interrogation should not be used at all. The objection to these practices is not that they are inhuman in themselves, but that the mental pressure thereby applied may induce a false confession.

A distinction should be drawn between confessions obtained by these methods and pointers to evidence other than the prisoner's own statements. Suppose that a prisoner, accused of murder by shooting, says in answer to questioning of this kind that he has hidden a gun in a particular place. It is possible that what he says may be false, and that he is induced to say it by the pressure of the circumstances. For this reason his statement should not be admitted in evidence. But if the police look in the place he has indicated, and find a gun bearing his fingerprints and with which the murder could have been done, there can be no objection to admitting evidence of the finding of the weapon. Our argument can be summarised in the following way: certain techniques of interrogation are dangerous because they may produce statements which are false; if a statement so produced cannot be verified it ought not to be admitted in evidence; but if a statement so produced can be and is verified by other evidence, the evidence of verification ought to be admitted.

22. There may be types of interrogation of persons in custody or of persons invited to police stations which are perfectly fair, and which are neither objectionable in themselves nor open to the objection that they may produce false statements. But any person questioned by police officers while in custody or at a police station is inevitably at a psychological disadvantage. It is difficult, if not impossible, to define with any precision the borderline between what is fair and what is oppressive questioning. One psychiatrist,[10] who has given special study to this matter, stated that an interrogator would be unlikely to induce an entirely false confession in a period of less than twenty-four hours' interrogation, but that, depending on the emotional stress in the mind of the person being interrogated, that person may be induced in a much shorter period to make statements containing serious distortions of fact. For these reasons it seems wise to regard all interrogation during the police station stage as interrogation capable of inducing false or distorted statements. Such statements can be induced by an interrogator whose only purpose is to establish what he believes to be the truth.

23. English criminal law, in its application to the police station stage of interrogation, is defective in two respects. First, the safeguards contained in the Judges' Rules enter into the procedure at too late a time. Rules 3 to 9 inclusive apply to " persons in custody " or " prisoners." Many thousands of people, however, are questioned at length in police stations who are not, at the

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[10] Dr. William Sargant, *Battle for the Mind.*

time of being questioned, "persons in custody." A person who is taken or invited to a police station for questioning, and who has not been charged, is in theory at liberty to leave the station whenever he wishes. In a great many cases this liberty does not exist in practice. In any event the psychological disadvantage of a person questioned at a police station in the presence of a number of police officers is much the same whether he is technically "in custody" or not. For these reasons the safeguards contained in rules 2 to 9 of the Judges' Rules should operate from the beginning of the police station stage of interrogation. This is not intended to apply to a person interviewed at a police station as a possible witness for the prosecution.

24. The second defect is that the definition of a "voluntary confession" in English law is inadequate in its application to interrogation in the police station stage. "In order to be admissible a confession must be free and voluntary, and unless it be shown affirmatively on the part of the prosecution that it was made without the prisoner being induced to make it by any promise of favour, or by menaces, or undue terror, it shall not be received in evidence against him."[11] A confession produced by prolonged and persistent interrogation of a person under great emotional stress would be "free and voluntary" within this definition. We do not think that such a statement is free or voluntary in the ordinary meaning of the words. It is true that the trial judge has discretion to exclude evidence of any statement which, in his view, has not been obtained in accordance with the essentials of justice, even if such evidence is technically admissible. We are not satisfied, however, that the circumstances in which statements are made at police stations are always brought to the attention of the court of trial. One of the reasons for this is the rule, to which we have already referred,[12] and which we think should be abolished, that a person who suggests that the police have behaved improperly towards him raises an issue which may lead to the disclosure of his previous convictions.

25. Even when the circumstances in which a statement is obtained are investigated by the courts, the full facts are often not before them. It should be the professional duty of all concerned with the prosecution to be most zealous in ensuring that all the circumstances relating to the making of a statement, which is alleged to be a free and voluntary confession, are before the court.

26. We were asked to consider whether it would be advisable to introduce into English criminal procedure the provisions of the Indian Criminal Procedure Code relating to the admissibility of

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[11] Hale's *History of Pleas of the Crown*, II, 285.

[12] See para. 12, above.

statements. In India no statement made to the police by an accused person, whether in custody or not, can be used in evidence at his trial.[13] But an accused person may, if he wishes, make a sworn statement before a magistrate. A sworn statement of this kind is admissible in evidence in the Indian courts, even if repudiated at the trial by the accused, provided that it has been made voluntarily. We do not favour the application of the Indian procedure to this country. One eminent member of the Indian Bar [14] has told us that these provisions of the law of his country work least well in urban areas, such as the City of Bombay. The provisions about sworn statements before magistrates may work well in unsophisticated rural communities, but would prove cumbersome and inappropriate to London and the other large cities of England. Moreover, the Indian rule that no statement made by an accused person to the police may be admitted in evidence is too drastic a solution to the problems we have indicated. The rule excludes statements which may be of a completely voluntary nature, and in some cases may deprive the defence of valuable material.

27. The law of Scotland relating to the investigation of offences differs from that of England, as appears from the account of it in the Appendix to this report. The police and court procedures of the two jurisdictions vary so greatly that we decided not to recommend the grafting of the more attractive features of the Scottish procedure on to the English.

28. One way of securing that only voluntary statements are admitted in evidence would be to introduce a rule that only statements made by a person in the presence of his solicitor, a friend or an independent witness should be admitted. A statement made in such circumstances obviously has great probative value. Defendants who sought to challenge the admissibility or accuracy of statements so obtained would be beset by many difficulties, and police officers who had arranged for some independent person to be present would be in a virtually unassailable position. On the other hand, there are objections to making the presence of such a third person a condition of admissibility of a statement. Many entirely voluntary confessions are made in the absence of persons other than the accused and the police. In many such cases it may be impractical to restrain a man from making a statement until his solicitor or an independent witness arrives at the police station. If voluntary statements of this nature were excluded from evidence, much

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[13] Indian Criminal Procedure Code, s. 164.

[14] Mr. Purshottam Trikamdas, Secretary-General of the Indian Commission of Jurists.

material valuable to the prosecution, and in some cases valuable to the defence, would be lost.

29. A more practical way of securing that only voluntary statements are admitted in evidence would be the making available to the court of a verbatim record of the conversation between the accused and the investigating officer or officers at the time when the statement was made. We appreciate that it would not be practicable to require the making of a verbatim record in every case. But in very serious cases, such as murder, an attempt should be made whenever possible to have a shorthand writer available during interrogation at police stations. More police officers should be trained to take notes in shorthand.

30. A suggestion which has been much canvassed recently is the use of tape recorders in recording testimony. We have been informed by an expert on tape recorders that it is easy for an experienced sound engineer to alter a recording. We have considered in detail several technical safeguards against falsification, in particular imprinting the reverse side of the tape, double track recording, the use of discs rather than tape, and the use of a locked cassette. None of these devices, with the possible exception of the last mentioned, are perfect safeguards. The use of a locked cassette may be difficult in practice. Nevertheless a close watch should be kept on technical developments in tape recording which may lead to a satisfactory safeguard against falsification. Experiments might usefully be made by installing tape recorders in some police cars for the purpose of recording statements made by witnesses "on the spot" in motoring cases.[15]

INVESTIGATION OF OFFENCES BY THE COURTS

31. We have examined the application of the maxim that "no man shall be compelled to incriminate himself" to the investigation of offences by the police. English criminal law also applies the maxim to the investigation of offences by the courts. An examination of whether the maxim ought to be applied to criminal trials can be conveniently resolved into two questions. First, should the accused be a compellable witness in criminal proceedings? Secondly, should the accused be compelled to disclose to the prosecution in advance of the trial the main lines of defence which he

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[15] There is also room for experiment in the recording of court proceedings. For a full description of such an experiment by the City of Nottingham magistrates, see (1960) J.P. 266. We are informed that the use of a tape recorder in court has the effect of shortening both the evidence of the witnesses and the speeches of the advocates.

intends to raise? The general heading of " Investigation of offences by the courts " includes a great many other controversial questions about the machinery of criminal justice. We do not intend to go over the ground already covered by the committees under the chairmanship of Mr. Justice Byrne and Lord Tucker, or to consider the merits of the present system of preliminary inquiry or the details of criminal trial. Our discussion is confined to the two fundamental questions we have indicated above.

Should the accused be a compellable witness?

32. Since 1898 the law of England has permitted an accused person to give evidence at any stage of the proceedings against him.[16] But an accused cannot be compelled to give evidence.[17] If the accused declines to go into the witness box, his silence must not be made the subject of any comment by the prosecution,[18] although the judge may comment upon it, if, in his discretion, he thinks it proper to do so.[19] There are no exceptions to the rule that an accused person must not be compelled to give evidence in criminal proceedings against him. Although some statutes [20] oblige persons to answer questions put to them by police officers or by certain tribunals, none goes so far as to compel an accused to answer questions at his own trial.

33. Although the principle that no man should be compelled to incriminate himself was first formulated in England in the sixteenth century, it has been applied effectively to criminal proceedings, in the rule that an accused person must not be compelled to give evidence, for only a little over a hundred years. During the sixteenth and early seventeenth centuries the examination of the prisoner was the essence of the criminal trial.[21] After 1688 overt questioning of the prisoner in criminal proceedings ceased, and the rule which prevailed in the civil courts until 1853, that a party to proceedings was incompetent as a witness, applied also in the criminal courts. This rule was subject, however, to two important qualifications. First, the prisoner in cases of felony could not be defended by counsel, and had therefore to speak for himself. Of this situation Sir James Stephen wrote that:

> " the evidence given against him operated as so much indirect questioning, and if he omitted to answer the questions it suggested he was very likely to be convicted." [22]

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[16] Criminal Evidence Act, 1898, s. 1.

[17] *Ibid.*, s. 1, proviso (*a*).

[18] *Ibid.*, s. 1, proviso (*b*).

[19] *R.* v. *Rhodes* [1899] 1 Q.B. 77.

[20] Para. 5, above.

[21] See Stephen's *History of the Criminal Law*, Vol. 1, pp. 325–326.

[22] *Ibid.*, Vol. 1, p. 441.

Secondly, two statutes of Philip and Mary [23] required the justices of the peace, before whom a person accused of felony was brought, to examine the prisoner. This procedure was described by Sir Thomas Smith, Secretary of State to Elizabeth I, as follows:

> " . . . as soon as any is brought to the justice of the peace, he doth examine malefactors, and writeth the examination and his confession." [24]

Although the statutes of Philip and Mary were re-enacted in 1826 [25] the practice of interrogation of prisoners by justices of the peace was by that time obsolescent. The practice was finally terminated by Parliament in 1848.[26]

34. The rules of English law described in paragraph 32 above are broadly similar to those of other common law systems. The relevant part of the law of Scotland is the same as the English law. The Fifth Amendment to the United States Constitution provides that " no person shall be compelled in any criminal case to be a witness against himself." [27] Canadian law contains provisions similar to the English law.[28] In most of the states of the U.S.A. and in Canada, not only the prosecution, but also the judges are debarred from commenting on the accused's failure to give evidence.[29] But in French law, and in most European legal systems, the examination of the prisoner is one of the main phases of the criminal trial. In France the prisoner must be examined by the *juge d'instruction* in the preliminary stage,[30] and may be examined by the judge at the trial. The prisoner is not sworn and cannot be punished for making false statements. Moreover, in French law the prisoner possesses a well recognised right to refuse to answer any or all of the questions put to him: his attention is drawn to this right: and the employment of any means of coercion in order to induce him to answer is unlawful.[31] Comment on the silence of a prisoner is in practice made by both the prosecution and the

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[23] 1 & 2 Phil. & Mary, c. 13 (1554); 2 & 3 Phil. & Mary, c. 10 (1555).

[24] Smith's *Commonwealth of England* (1583), p. 90.

[25] 7 Geo. 4, c. 64.

[26] Indictable Offences Act, 1848.

[27] The Fifth Amendment applies in federal courts but may be excluded in state courts: see *Palko* v. *Connecticut* (1937) 302 U.S. 319.

[28] Canada Evidence Act, 1893.

[29] Canada Evidence Act, 1952, s. 4 (5).

[30] French Code of Criminal Procedure (1958), art. 114.

[31] Garraud, *Traité théorique et pratique d'Instruction Criminelle*, Vol. II, p. 230.

court.[32] The laws of Italy[33] and the German Federal Republic[34] contain similar provisions. In Soviet Russia a prisoner has, in theory, if not always in practice, the right to refuse to give evidence.[35] Indian law requires the court in criminal proceedings to question the accused generally on the case after the witnesses for the prosecution have been examined.[36] The accused is not sworn,[37] and does not render himself liable to punishment by refusing to answer, or answering falsely, the questions put to him by the court.[38] It is the duty of the court to inform the accused that he is not bound to answer.[39]

35. The greatest critic of the immunity of the prisoner in England from questioning in the courts was Jeremy Bentham. He wrote:

> "If all the criminals of every class had assembled, and framed a system after their own wishes, is not this rule the very first which they would have established for their security? Innocence never takes advantage of it; innocence claims the right of speaking, as guilt invokes the privilege of silence."[40]

Bentham argued that the immunity from questioning was a rule which from its nature could protect only the guilty. It was not a rule which operated to acquit some guilty men for fear of convicting some innocent. In any case, wrote Bentham, the rule that no one should be compelled to incriminate himself was not logically applied by the English courts because they admitted evidence of statements ascribed to the accused by other witnesses and documents written by him.

> "Thus what the technical procedure rejects is his own evidence in the purest and most authentic form; what it admits is the same testimony, provided that it be indirect, that it has passed through channels which may have altered it, and that it may be reduced to the inferior and degraded state of hearsay."[41]

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[32] Helie-Depeiges, *Pratique Criminelle des Cours et Tribunaux*, Vol. I, p. 403.
[33] Italian Codice di Procedura Penale, 1930, art. 441 (II).
[34] German Code of Criminal Procedure, arts. 243, 257 and 163.
[35] U.S.S.R. Code of Criminal Procedure of 1927, art. 136, and see A. K. R. Kiralfy, "The Campaign for Legality in the U.S.S.R." (1957) I.C.L.Q. 634–635.
[36] Indian Code of Criminal Procedure, 1898, s. 342 (1).
[37] *Ibid.*, s. 342 (4).
[38] *Ibid.*, s. 342 (2).
[39] *Re Dinoo Roy* (1871) 16 W.R.(Suth.)Cr. 21; *Kalu Manjhi* v. *King Emperor* (1929) I.L.R. 9 Pat. 504.
[40] Bentham, *Works*, Vol. VII, pp. 444 *et seq.*
[41] *Ibid.*

36. Bentham's views were in part indorsed by Sir James Stephen. Stephen thought that the immunity of the accused from questioning was "highly advantageous to the guilty," but conceded that "it contributes greatly to the dignity and apparent humanity of a criminal trial," and "stimulates the search for independent evidence." [42] Stephen, writing in 1883, was principally concerned to seek the abolition of the rule then in force that an accused was not competent to give evidence. But his conclusion was:

> "I am convinced by much experience that questioning, or the power of giving evidence, is a positive assistance, and a highly important one, to innocent men, and I do not see why in the case of the guilty there need be any hardship about it." [43, 44]

37. More recently the rule has been criticised by Professor Glanville Williams [45] who advocates the adoption of a modified version of the French practice in which the questions are put by the prosecution rather than by the judge.

> "The sensible solution would be to require an accused person to listen to questions put to him by counsel for the prosecution, though with no penalty for refusal to answer." [46]

But his views are not shared by all academic lawyers. Professor C. J. Hamson favours the retention of the present law:

> "The alteration means more than the upsetting of an arbitrary rule of evidence: it involves the turning loose upon the prisoner of the prosecution, its agents and its engines. A period marked by an enormous increase of the State's coercive powers is not the most opportune moment, if ever it be opportune, again to subject the prisoner to 'question.'" [47]

38. The distinction between the Anglo-American and the European and Indian procedures is described by Professor Glanville Williams in the following way:

> "In France, as elsewhere on the Continent, an unfavourable inference may be drawn from the accused's silence under questioning; in England an unfavourable inference may be drawn from the accused's failure to volunteer for questioning." [48]

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[42] Stephen, *History of the Criminal Law*, Vol. I, pp. 441–442.

[43] *Ibid.*, p. 442.

[44] Bentham's view was also indorsed by Salmond. See Salmond, *Jurisprudence*, (1st ed., 1902).

[45] Glanville Williams, *The Proof of Guilt*, Chap. 3.

[46] *Ibid.*, p. 60.

[47] *The Times*, March 15, 1950.

[48] Glanville Williams, *The Proof of Guilt*, p. 61.

One distinguished French lawyer derives from a study of the different procedures the conclusion that:

> ". . . the position . . . on this point does not seem to me to be very different in our two countries."[49]

In practice, however, the silence of the accused is treated in quite different ways on the Continent and in England. In France, for example, guilt is inferred from the prisoner's refusal to speak; his silence is sometimes referred to as "rébellion envers la justice."[50]

39. We have two objections to the Continental system. First, the procedure contains an implied invitation to prisoners to commit perjury. Secondly, the sanction against silence, the presumption of guilt from the prisoner's refusal to speak, is alien to the general conception of justice in this country. In England the prosecution is considered to be under an obligation to prove its case, and not merely to assert a case which the prisoner is left to disprove.

40. We would reject, subject to one exception, any amendment to the present rules of English law about the immunity of accused persons from questioning in the courts. The exception concerns the present prohibition of comment by the prosecution on the failure of the accused to answer questions. This prohibition represents an important difference from the Continental practice. In France, for instance, the prosecution usually makes the most of the prisoner's refusal to speak.[51] If a prisoner chooses to remain silent, the fact that he has so chosen should be brought to the attention of the jury.[52] We find neither merit nor reason in the present English rule that comment may be made by the judge but not by the prosecution.

Should the accused be compelled to disclose his defence in advance of his trial?

41. In a civil action a defendant must, if he wishes to contest the case, deliver to the plaintiff a written pleading, in answer to the plaintiff's statement of claim.[53] The defendant must set out in his pleading the material facts on which he intends to rely in his defence at the trial.[54] The rules of pleading in civil actions are designed to

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[49] R. Vouin (Professor of Law in the University of Bordeaux) (1956) I.C.L.Q. pp. 167–168.

[50] Hammelman, "The Evidence of the Prisoner at his Trial" (1949) 27 Can. Bar Rev. 657.

[51] *Ibid.*

[52] In cases where, under the present English procedure, the prosecution has no right to make a closing speech, we suggest that the prosecution should be allowed to make this comment after the closing speech for the defence.

[53] R.S.C., Ord. 21, r. 6.

[54] R.S.C., Ord. 19, r. 4.

secure that all the parties come to the trial knowing the case they have to meet.

42. The rules in criminal proceedings are entirely different. The prosecution is obliged to disclose the whole of its case to the accused in advance of the trial. All or most of the prosecution case is disclosed to the accused at the preliminary inquiry before the examining magistrates. If the advocate for the prosecution wishes to rely at the trial on material which is not on the depositions taken before the magistrates, he must disclose it by serving on the accused a notice setting out in the form of a statement by the witness the additional evidence he proposes to call.[55] In contrast the accused need not reveal the evidence he proposes to call, the documents he intends to produce, or even the principal lines of his defence. In criminal proceedings the defence can, and often does, take the prosecution by surprise at the trial. A common example of surprise tactics by the defence is where an alibi is produced at the trial which the prosecution has never heard of before and has no means of testing.

43. Criticism is sometimes made of these rules, that the opportunities for surprise which they provide are unduly favourable to the accused, and may help to bring about the acquittal of the guilty. On the other hand, if prisoners were compelled to disclose in advance the main lines of their defences, this might in practice result in their being required to disprove their guilt. We should find this objectionable for the reasons we have already set out in paragraph 39 above. Moreover, there are practical difficulties in the way of introducing into criminal procedure a system of pleading comparable to that in civil cases. Bearing in mind the number of cases which are dealt with in the criminal courts, the delay and expense which would be caused, if, in every criminal case, solicitors and counsel had to be instructed to prepare the equivalent of pleadings, to settle further and better particulars and requests for such particulars, and to make or resist other interlocutory applications, would be out of all proportion to the advantages, if any, thereby gained.

44. At present, however, much time and money is often wasted in criminal cases in the proof of facts which are not in dispute. The prosecution or the defence may frequently be compelled to call witnesses to prove entries in books, the ownership of a motor-car, or even that a copy of *The Times* is indeed what it purports to be, when none of these matters is in issue. Time and expense could be saved, without danger of injustice, if either side were allowed to serve on the other, before the trial, a notice to admit facts or

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[55] *R.* v. *Greenslade* (1870) 11 Cox C.C. 412.

documents. The party served should not be compelled to admit all or any of the facts or documents set out in the notice, and the prosecution should not be allowed to comment at the trial on any refusal to admit. The prosecution should not be allowed to serve such a notice unless the accused is legally represented.

Summary of Recommendations

1. When a person makes an oral statement in the course of an investigation of any offence by the police, the police officer or officers present should record it in writing at the time it is made, or as soon as practicable afterwards (para. 7).

2.—(a) If a person who has made a statement to the police is subsequently accused of the crime, in connection with which the statement was made, he should be served with a copy of his statement as soon as practicable after being charged or summonsed (para. 7).

(b) Failure to serve such a copy should render the statement inadmissible in evidence. Failure to take reasonable steps to serve the copy promptly should be grounds for excluding the statement from evidence (para. 7).

(c) The copy served should be indorsed with a notice telling the accused to inform the police in writing, as soon as possible after seeing a solicitor, of anything which he alleges to be inaccurate or misleading in the record (para. 7).

3. The courts should possess power to exclude any evidence of statements made so long before the trial that a man may not reasonably be expected in all the circumstances to be able to contradict them (para. 8).

4. The prosecution should not be allowed to cross-examine an accused about his character merely because he has attacked the character of a witness for the prosecution in the course of challenging the accuracy or admissibility of a written record of a statement made by him, or evidence of an oral confession (para. 12).

5.—(a) Subject to recommendations 5 (b), (c) and (d) below, a child should not be questioned by the police in the absence of his parent or guardian (para. 14).

(b) When a police officer wishes to question a child and his parents or guardian cannot be found or cannot or refuse to be present or are alleged to be implicated in the offence under investigation, the questioning should be done in the presence of the Children's Officer of the local authority for the district, or a person other than a police officer, nominated by him (para. 14).

(c) Statements made by a child in answer to questioning by the police in the absence of his parent or guardian, or the person specified in recommendation 5 (b) above, should not be admissible in evidence (para. 14).

(d) Recommendations 5 (a), (b) and (c) above should not apply to questioning of a person by the police at the scene, and at the time of the crime of which he is later accused (para. 14).

6. While no practical purpose would be achieved by making an exhaustive set of laws or rules about ill-treatment of persons at police stations, it would be desirable for the Home Secretary to prepare and lay before Parliament a basic code of conduct (para. 20).

7. The safeguards contained in rules 2 to 9 of the Judges' Rules should apply:

(i) to all questioning of a person after a police officer has formed the intention to institute proceedings against him for a criminal offence, whether by charge or summons; and

(ii) to all questioning of a person in a police station, whether or not such person is technically "in custody." (This is not intended to apply to a person interviewed at a police station as a possible witness for the prosecution.) (Para. 23.)

8. It should be the professional duty of all concerned with the prosecution of criminal cases to be most zealous in ensuring that all the circumstances relating to the making of a statement, which is alleged to be a free and voluntary confession, are before the court (para. 25).

9. In very serious cases, such as murder, an attempt should be made whenever possible to have a shorthand writer available during interrogation at police stations. More police officers should be trained to take notes in shorthand (para. 29).

10. A close watch should be kept on technical developments in tape-recording which may lead to a satisfactory way of recording testimony. Experiments might usefully be made by installing tape-recorders in some police cars for the purpose of recording statements made by witnesses "on the spot" in motoring cases (para. 30).

11. The prosecution ought to be allowed to comment on the failure of an accused person to give evidence at his trial (para. 40).

12.—(a) Subject to recommendation 12 (d) below, the prosecution ought to be allowed to serve on the defence, and the defence ought to be allowed to serve on the prosecution, before the trial, a notice to admit facts and/or documents (para. 44).

(b) A party served with such a notice should not be compelled to admit any of the facts or documents therein referred to (para. 44).

(c) The prosecution should not be allowed to comment at the trial on any refusal by the defence to admit facts or documents (para. 44).

(d) The prosecution should not be allowed to serve such a notice on an accused person unless he is legally represented (para. 44).

APPENDIX

The Law of Scotland on Investigation of Offences by the Police

We are indebted to Professor T. B. Smith, of the University of Edinburgh, for the following summary of the Scottish law.

In the leading case of *Chalmers*,[56] a Full Bench of the High Court of Justiciary quashed a conviction of murder, and reviewed the law regarding the evidence of alleged confession. Although the judges thought it impossible to lay down comprehensive rules which would cover every situation, their conclusions may be summarised as follows:

1. At the stage of initial investigation the police may question whom they choose with a view to acquiring information which may lead to the detection of the person guilty of a crime but they cannot compel the giving of information, nor can they require any person to go with them to the police station against his will unless they have arrested him. No person can be lawfully detained on suspicion unless he has been arrested and charged.

2. After a person has been arrested and charged with crime, there must be no interrogation whatsoever by the police. If a suspect wishes to make a statement, he should be taken before a sheriff, and should be cautioned and advised of his right to the services of a law agent.[57]

3. At any stage when suspicion has become centred on a particular individual as the likely perpetrator of the crime, further investigation by the police becomes dangerous from the viewpoint of admissibility of evidence. If questioning is carried too far, as by extracting a confession by cross-examination, the confession will be excluded. After an individual has come under serious consideration as the likely perpetrator of a crime, only his voluntary statement is admissible; this must be a statement made without pressure

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[56] *Chalmers* (1954) J.C. 66, at p. 79.

[57] *Ibid.*

or inducement and not under cross-examination. The sometime narrow distinction between "possible" and "provable" culprit, which is very relevant in deciding whether an individual is entitled to the safeguards provided for accused persons, arises in connection with the police investigation in Scotland, while in France it becomes relevant in proceedings before the *juge d'instruction*.

4. A declaration made by a suspect before a magistrate, such as a sheriff, would be free from the suspicions which, justly or unjustly, may attach to allegedly voluntary statements made in a police station in the presence only of police officers. If an accused wishes to volunteer information, he should be permitted to emit a declaration before the sheriff in the presence of his solicitor.

5. It is not the function of the police to strive for confessions. An excess of zeal in this respect cannot be purged by any number of cautions.

6. If property is recovered as the result of questioning which would be inadmissible for the foregoing reason, it is incompetent to link the finding of such property with statements made by the accused, and evidence of what the accused did, obtained as the result of improper questioning, would not be admissible.[58] Thus, in *Chalmers*' case it was held that the trial judge had wrongly admitted evidence that the suspect, after police interrogation, had led the police to a place where the wallet of the murdered man was found.

After *Chalmers* it was doubtful whether any statement made by an accused in custody to the police—and not to a "magistrate" (who would usually in Scotland be the sheriff) could ever be admitted as evidence at trial. However, in *Manuel*, 1959 S.L.T. 23, a case in which the prisoner was convicted of one murder and six capital murders, it was held that evidence of the accused's written statement (made while in police custody) and evidence of his conduct in leading the police to where he had admitted to concealing a body and shoes, was admissible evidence at his trial. The crucial passage in the opinion of the Lord Justice-General (Clyde) was as follows:

> "The law of Scotland goes further than many other legal systems in protecting a person who is detained by the police from any risk of being driven or cajoled or trapped into admissions of guilt, even though this may complicate the quite legitimate detection of crime by the authorities. So anxious is our law to secure that such persons get fair play under our system of criminal administration, and so firmly rooted in our

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[58] *Cf.* Rule 3, Judges' Rules in England.

> law is the principle that no man is bound to incriminate himself. But although this is all true there is nothing to prevent a man who is so detained by the police or who has even been charged with a crime from making a voluntary statement to the police, if he chooses to do so. And it is perfectly proper that such a statement if made should be proved in evidence to the jury, as one of the features for them to consider in deciding whether the crime has been committed. But the test is always whether that statement was fairly obtained. To be a voluntary statement which can be proved before a jury the statement must have been freely given, not in response to pressure or inducement and not elicited by cross-examination, other than what is directed simply to elucidating what has been said."

DISSENTING OPINION OF JOHN FOSTER, Q.C.

If I were able to agree with the majority that the accused's privilege against self-incrimination should remain inviolate, then I should be happy to sign this report; the suggestions in paragraphs 1–30 seem to me eminently sensible. I feel strongly that English law should not allow the right of a suspected person not to answer questions to continue, or the rule of non-compellability of the accused as a witness to remain as part of the criminal trial.

The rule of privilege against non-incrimination, or the right not to say what one knows, has existed in our legal history for only little more than two centuries, and its appearance was then partly accidental and partly for reasons which do not obtain today. I think that any system of criminal justice must strive for the truth, and who better to assist in arriving at the truth than the chief suspect (as the accused must inevitably be). As Lord Hardwicke is reported to have said in 1742[1]: "The public has the right to every man's evidence."

The present rule must tend to assist the man who knows his guilt. Just as every accused has a vested right in a perverse jury, so he gambles on the failure of the prosecution to prove its case without his assistance either before or at the trial. The incidence of guilty persons going scot-free is I think considerable. The compellability of the accused will not lead to conviction of the innocent. The more investigation of a crime there is—in which the accused as a witness can assist materially—the less chance there is of a wrong conviction. That does not mean that innocent people will not be convicted in the future, but the compellability rule if it is adopted will not be responsible.

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[1] Quoted in *Wigmore on Evidence*, Vol. 8, sec. 2192 (3rd ed., 1940).

The rule that the suspect must be cautioned when the police have made up their minds to arrest seems to me contrary to common sense and the suspect in my view should not be cautioned and should be told, if he objects to being questioned, that he is required to answer. The Judges' Rules, if they are carried out to the letter which I believe they often are not, protect the criminal undeservedly in this respect and it is not uncommon for a suspect or a person who has been charged to be prevented by his legal representative from telling the truth in case it might show his guilt.

In fact an argument was put forward at our Committee that it was bad luck on inexperienced offenders who often did not know their rights and gave themselves away, while the old lags, knowing they need not say anything, remained silent and secured acquittals. I would have thought that the bad luck was on the community that a sentimental sporting rule for which there was no justification should enable guilty men to escape.

This in my view is one of the factors preventing the decrease of crime by more convictions. It is more serious than in the past because of the superior standard of education. Criminals nowadays know more and also, because of the extension of the system of state-aided defences, are more aware of their legal rights to refuse to answer police inquiries. TV, radio and magazines have also helped to spread the knowledge that citizens are not bound to help the police and that a refusal to answer questions or to go into the witness-box will not be adverse to their interests if they are accused of a crime.

The rule of non-compellability is one of the aspects of the English criminal trial which gives the air of "fairness." It overcompensates to the accused for the unfairness which pertains to some aspects of pre-trial procedure; indeed, the considerations of this Committee are prompted by the feeling that much police action goes uncontrolled, even if those police powers are not too often abused. But under the English system as opposed to Continental systems, the courts are almost powerless until a charge has been made. Only then can the courts control police activity. The judges have fashioned rules whereby certain types of evidence, such as confessions, are excluded from the trial because they can be extracted unfairly, and under no judicial supervision. There is no such reticence when it comes to a confession made to the court. We accept with some alacrity any plea of guilty as being conclusive of the trial. Even if a man pleads guilty in a Continental trial the prosecution must still prove its case; is this not good common sense? In essence I think the scales of justice are weighted against the criminal before trial because there is no control over the police. The majority recognise this in paragraph 3 of the report. English criminal trial procedure therefore tips the scales the other way in order to redress this balance. What I feel is that the true balance is not finally arrived at, and that a very proper desire to see justice done leads us to tip the scales heavily against the prosecution when it comes to trial. That is why, of course, the police are so keen to adduce evidence of confessions; it is a real way of avoiding the obstacles that are placed in their way at the trial and after caution.

Dr. Glanville Williams has rightly said that if dangerous criminals cannot be questioned before a magistrate or judge the frustrated police may resort to illegal questioning and brutal "third degree" methods in order to obtain convictions.[2] If English criminal law, therefore, were to introduce a rule whereby the accused or suspect must answer questions and give evidence, I would remove the ability of the prosecution to adduce any confession in evidence before the trial court.

The rule as it exists today certainly did not exist prior to the Restoration, and it is likely that the rule did not become established until well into the eighteenth century. It is not without significance that Dean Griswold[3] of the Harvard Law School refers to the rule as "one of the great landmarks in man's struggle to make himself civilised." If, as is the case, the rule now merely protects the guilty from suffering their just deserts, such a glowing phrase can only have meaning in some historical perspective. This is in fact the case. The privilege against self-incrimination is a reaction against past abuses. If the rule is intended also as a safeguard against the occurrence of those abuses it would be well to investigate how these abuses occurred. In fact, modern civilisation, with a vigilant Press and built-in safeguards developed over the last century, has made a recurrence of these abuses well-nigh impossible.

It is quite clear that past generations, which forced an accused to trial by ordeal or the compurgation oath, plainly had no scruple against such compulsion. These methods were enforced in the sixteenth century without the slightest whisper of complaint. In the trials of that period moreover the first step in the proceedings was to read to the jury the compulsory examination of the accused before the magistrates and every accused felon was required to be examined by the justices of the peace and his examination preserved for the judges at the trial. There was similarly no murmur against this until the mid-1700s. Holdsworth [4] states in fact that until the middle of the seventeenth century at least the examination of the accused was the central feature of the criminal procedure of the common law. If the proper method of conducting a criminal trial was to focus the trial on the accused, what makes that method unacceptable now?

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[2] *Proof of Guilt*, p. 48.

[3] *The Fifth Amendment Today* (1955), p. 7.

The answer is, that even in the seventeenth century there was not sufficient clamour against the rule itself to warrant reform even though abuses certainly were outraging public opinion. In fact, the rule against self-incrimination was introduced accidentally when the Courts of Star Chamber were swept away and the old rules changed with the departure of those maligned courts. Most accused before these courts did not actively campaign against their being pressed and bullied to answer questions—although complaint was made—but they claimed that proper presentment of the indictment and accusation should be afforded to them. There is, therefore, nothing to suggest that the rule has anything of the quality of a golden thread woven into the fabric of English law. It is an historical accident.

Objections to the abolition of the present rule have been made:

1. The procedure involved in the accused's compellability as a witness, they say, contains an " implied invitation to prisoners (*sic*) to commit perjury." Is not the present situation whereby an accused *may* give evidence equally an " implied invitation " to go into the box and tell lies? The truth of the matter is, that every man who gives evidence is expected to tell the truth, and the accused is in no different a position from his fellow beings. To compel the accused to give evidence invites him to tell the truth; in reality he will not unnaturally, if guilty, tend to tell lies. Why should not the accused's attempt at lying be exposed to examination by the prosecution? His silence should not give him an advantage or deprive the tribunal of a chance of assessing the truth; and in any event a law which permits a defendant to testify in reality compels him to testify. I would agree with Dr. Glanville Williams [5] that the sensible solution would be to require an accused person to listen to questions put to him by counsel for the prosecution, though with no penalty for refusal to answer. I would oppose the trial judge being free to cross-examine; to that extent the accusatorial system in England should be retained.

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[4] H.E.L., Vol. IX, 199.

[5] *Proof of Guilt*, p. 60.

2. The majority states that the sanction against silence, namely the presumption of guilt from the prisoner's refusal to speak, is alien to the general conception of justice in this country. I think the rule of silence should be abolished without infringing the valuable rule of the burden of proof being on the prosecution throughout, with the exception of insanity and some statutory provisions, though I think that the defence should be able to make admissions, and that a greater class of documents should prove themselves.

Once a prima facie case was made out at the conclusion of the prosecution's evidence before the magistrates, then the accused should be called to give evidence. I do not think that the Continental practice, whereby the accused is the first witness at every trial, should be adopted, but the evidence taken in the police court should be read at the trial. This would in no way disturb the onus of proof.

Even if it were correct to say that there is a presumption of innocence in a criminal trial, there would be no question of any alteration in that presumption by the accused's compulsory attendance in the witness-box. But, in fact, as Lord Goddard said in *R.* v. *Hammersley* [6] (the Brighton police conspiracy trial on appeal), there is no presumption either way; the Crown must establish beyond reasonable doubt that the accused is guilty. The court begins with a neutral position of having a predisposition neither towards guilt nor towards innocence.

There is one final point in favour of a new rule. Making an accused give evidence would remove the tactical consideration every defence counsel must make whether to put his client in the box. It may be that many an accused who has something to hide is kept out of the box (quite wisely) at the instance of his counsel or because he wishes to protect someone else.

If he has to go into the box the whole truth is more likely to emerge, which may throw light on some feature of the case and possibly lead to an acquittal or a diminution of the gravity of the offence (*e.g.*, from capital murder to murder or manslaughter) or to the establishment of some mitigating factors. It is much better that mitigating factors should emerge in the course of the trial rather than be pressed upon the court in counsel's speech after conviction when they always sound rather stilted and unreal. I think, therefore, that real advantages are available to the accused in being made to give evidence. If this is so (as I believe it is) it strengthens considerably the argument in favour of a change in the law.

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[6] [1958] Crim.L.R. 422; 42 Cr.App.R. 207.

If this change is acceptable I would make one major concession for the benefit of the accused. I think that no confession obtained from him during police investigation should be admissible in evidence at the trial unless he repeated it or adopted it when required to answer questions in the magistrates' courts. I say this for two reasons:

1. Because in every extraction of a confession there is an element of coercion by the police. It may not be manifested in any physical sense but be wholly psychological. It is not just that the accused may not tell the truth, but that the manner in which the confession is related and recorded may deviate from the truth even only in the nuances of expression. It is better that confession should be given before the magistrates or the trial court where the accused can be asked to explain his story in the light of all other evidence. I agree with my fellow committee-men when in paragraphs 19–23 they say that almost every confession suffers from these defects, even though it is technically a " voluntary statement."

2. Because in any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure (which is what the admissibility of confessions amounts to) as a source of proof, society suffers morally thereby. The prosecution develops an inclination to rely upon such evidence and to be satisfied with incomplete investigation of other sources. Police, I fear, tend to overdo the questioning of suspects in order to extract confessions, because then they can sit back secure in the knowledge that a conviction is almost assured. I think this attitude is bad for two reasons:

   (a) because a confession ceases to have the character of a freely made statement, and

   (b) because it tends to hamper investigation of the truth of a crime.

Police may too readily charge a man with a crime because insufficient investigation has taken place. The Supreme Court of the United States[7] once said that the refusal to admit most confessions was a safeguard against " heedless, unfounded or tyrannical prosecutions." And if the accused is compellable at his trial there will be less urgency in the police to get him to " come clean " at an earlier stage of the process of criminal investigation which has the obvious defect of having them uncontrolled by the courts.

While I would therefore exclude all confessions, I must make it clear that I would only exclude the " I did it " variety. I would not exclude as evidence admissions of the accused of factual statements, because they are readily verifiable by other corroborative evidence. I would draw the distinction between the primary facts and inferential facts. If the accused said " I was at the dance hall at 10.30 on the night of Friday the 5th " that would be admissible evidence by the policeman to whom it was said. But if the accused went on and said " and I am sorry I did it," that would be excluded. I would not in any way direct that the police could not extract confessions by all non-physical or non-coercive methods, largely because I think under our system it is not possible to exercise effective control, but their inability to rely upon confessions at the trial would mean that they would have to follow up on any disclosure of information in the confessions. In this way the search for truth would be more nearly achieved.

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[7] *Twining* v. *New Jersey*, 4 211 U.S. 78, 91 (1908).

As a corollary to the compellability of the accused as a witness at the preliminary hearing and at his own trial, I think that the accused should also disclose his defence to the prosecution at the time of the committal proceedings, and should go into the witness-box merely to tell his story and not to be cross-examined at that stage on his veracity. There should be some notice given by the defence of the witnesses it is proposed to call, and a brief indication of what they are going to give evidence about. The trial should not be unbalanced by giving the accused the right to introduce the element of surprise at the trial. Alibi, witnesses, names and addresses should especially be given.

If these recommendations were adopted I think that the English criminal trial would be less of a game or a contest and more of a serious inquiry as to the true nature of the crime and its real perpetrator. That should at least be the ideal towards which criminal justice should strive.

Assessors in Criminal Trials in West Africa

By BERTHAN MACAULAY, M.A., LL.B.

Continuation of an article printed at [1960] Crim.L.R. 748

As was indicated at the beginning of this article, its purpose is to examine the role of assessors in Criminal trials in West Africa and to see what attempts have been made by the West African Court of Appeal and the Privy Council to assimilate their functions with those of a jury. In this part it is intended to describe the status of assessors at different stages in the criminal trial.

(b) The Status of Assessors at Different Stages in a Criminal Trial

As in England, the trial of an accused person in West Africa begins with his being arraigned before the court and the appropriate officer reads the charge to him. Archbold states of the English criminal trial[1]: "*Where the prisoner stands mute, the court cannot itself determine whether in fact he is mute of malice or by the visitation of God . . . but must direct a jury to be forthwith empanelled and sworn to try this issue, and such jury may consist of any twelve men who may be present.*" In West Africa, the issue is tried by assessors. Unlike in England, they must be persons who qualify and have been selected to sit as assessors in the particular sessions of the Supreme Court (or High Court as it is sometimes called).

Where the prisoner pleads guilty, he is convicted on his own confession, but where he pleads "not guilty" he is deemed to have put himself on his trial. In England,[2] the clerk calls out the names of the jurors who number twelve out of the list of jurors empanelled for the particular assize; whereas in West Africa it is the judge who selects the assessors from a list of assessors, who have been appointed as such, invariably by the Governor or other like authority.

Unlike a jury trial in England,[3] there is no right of challenge. In *Conteh* v. *The Queen*[4] at the trial it appeared that one of the assessors was married to a daughter of the principal complainant who was the object of an alleged conspiracy to accuse falsely of a crime and was the first witness for the prosecution at the trial. Counsel for the appellants at the trial, objected to the assessor and the Solicitor-General, who appeared for the prosecution, opposed it. The judge ruled as follows:

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[1] Archbold, para. 427.

[2] Archbold, para. 506.

[3] Archbold, Chap. 3, s. 3.

[4] [1956] A.C. 158; 1 West African Law Reports, p. 49.

> "I find that the objection is misconceived. There is nothing in the Ordinance, cap. 50, which gives a right to object to an assessor's sitting on a case, and if there were such a right I am not satisfied that sufficient reason has been given to disqualifying P.C. Musa Gendemeh sitting on this trial as an assessor." [5]

Lord Somervell, who gave the opinion of the Board, said, of this ruling,

> "Notwithstanding the silence of the Ordinance their Lordships are clear that the objection was not misconceived. It might or might not have been proper to accede to it. Either party, the Crown or the accused, is entitled to raise an objection to an assessor on the ground that he is interested in or connected with the subject-matter of the proceedings or those concerned so that it is undesirable for him to sit as an assessor. It would be for the judge to rule on the objection in his discretion. In small communities it may be difficult, of course, to find assessors who are wholly unconnected with everyone concerned. It may be that in this case there would have been a difficulty in getting another assessor. Apart from any such difficulty it would seem unfortunate that one of the assessors should have been related in the degree stated to the complainant." [6]

On a jury trial after all the evidence has been given, the judge sums up to the jury, and as has been stated the practice is the same in West Africa in relation to jurors.

Archbold states:

> "After the conclusion of the trial the jury are not allowed to separate until they have considered and returned their verdict or have been discharged for failure to agree." [7]

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[5] At p. 164. The above ruling was quoted in the opinion of the Privy Council.

[6] At p. 164. It is clear that what the Board had in mind was the possibility of a biased opinion by the assessor, which opinion the judge had to take into account in coming to a decision. In England, the challenge of a juror in such a case would be on the ground of affinity: see Archbold, para. 511.

[7] Archbold, para. 571.

> "If the jury are unable to agree upon their verdict without retiring from their box, they withdraw to a convenient place appointed for that purpose, an officer being sworn to keep them and to suffer none to speak to them without leave of the court, nor to speak to them himself, except only to ask them whether they are agreed on their verdict." [8]

In the case of assessors in West Africa the statutory legislation provides that the assessors shall give their *opinions* which implicitly negatives any requirement of unanimity as required in the case of jurors. The opinions of assessors must be individual opinions and the statutory legislation is silent as to whether discussion either in their box or in retirement is permissible.

In the unreported case of *Karefa Smart* v. *R.*[9] one of the grounds of appeal by the appellant was "*that after his summing up the learned trial judge permitted the assessors to retire from the court without being bound by oath*" (as is the practice in England at some Assizes), "*to discuss the case with no one until they had formed their individual opinions and until they had given such opinions orally before the court.*" Whether such an omission would be fatal to a conviction in England does not appear to have been discussed by the appellate tribunals in that country, nor in the instant case, did the West African Court of Appeal decide it. In the judgment of the West African Court of Appeal, the following passage appears:

> "In an argument which was not without interest, learned counsel for the applicant contended that not to put the assessors in a criminal trial in the Supreme Court of Sierra Leone in charge of a bailiff sworn not to permit them to discuss the case with any one is an illegality or irregularity fatal to a conviction; and he asked us to find that that was what occurred. In the absence of any evidence, we could only have so found upon a presumption of illegality or irregularity. But the presumption is the other way; and since there is no evidence to rebut it, it is idle for us to consider whether the omission alleged would have vitiated the conviction."

The other ground of appeal in the *Karefa Smart* case was "*that the learned judge permitted the assessors after his summing up to leave the court and mingle freely with the crowd outside the precincts of the court before the assessors gave their opinions in court.*" Counsel for the appellant cited the English case of *R.* v. *Neal* [10] where a jury who had retired to consider their verdict and had been given into the charge of the bailiff were allowed to leave the court for the purpose of obtaining refreshment. In that case the Court of Criminal Appeal had held that the trial thereby became a nullity. It appears from the judgment of the West African Court of Appeal that the same would have been held by that court in a case of trial when assessors, for the court said:

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[8] Archbold, para. 589.

[9] Judgment of the West African Court of Appeal (Criminal App. 42/58) delivered June 1, 1959, in Sierra Leone.

[10] [1949] 2 K.B. 590; [1949] 2 All E.R. 438; 33 Cr.App.R. 189.

> ". . . Counsel made an oral application without notice to the other side for leave to call a witness to prove what was alleged. The notice of application for leave to appeal was dated December 8, 1958. The application for leave to adduce evidence was made only on May 28, 1959, and up to then no step whatsoever had been taken for the purpose of establishing the allegations in this ground of appeal. The application to call witnesses was without notice and it was too late, and we refused it. The allegations on which the eighth ground of appeal is founded are unproved, and the ground fails."

As had already been stated the assessors need not be unanimous in their opinions, and these opinions when given do not bind the trial judge. In England, it is an essential requirement in a criminal trial that the verdict of the jury must be stated in open court. The Privy Council, referring to the position in England in *Dhalamini* v. *R.*[11] said:

> "In this country the omission would be a fatal flaw entitling a convicted criminal to have the conviction set aside. . . . In at least three codes with which their lordships are familiar—those of India (Code of Criminal Procedure, 1898, s. 309), Gold Coast (Criminal Procedure Code (1936 Revision), s. 286), and Nigeria (Criminal Procedure Ordinance, 1914, s. 142) where trial is with the aid of native assessors, the assessor is directed to give his opinion orally in court." [12]

In Sierra Leone, there is no positive statutory provision requiring the giving of opinions in open court.[13] Referring to

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[11] [1942] A.C. 583; [1943] 1 All E.R. 463. This was a criminal case from Swaziland, where the assessor gave his opinion to the judge privately in chambers. Privy Council held this to be an irregularity which vitiated the proceedings. The conviction was therefore quashed.

[12] At p. 466.

[13] s. 15 (2) of the Courts Ordinance, Chap. 50, reads: "The opinion of each assessor in any such criminal proceedings shall be given orally and shall be recorded in writing by the judge, but the decision shall be vested exclusively in the judge. . . ." This section deals with trial in the Protectorate.

s. 46 (1) of the Jurors and Assessors Ordinance, Chap. 114, which deals with trials in the Colony (see notes 2 and 4, *supra*) reads: "Upon any such trial the opinion of each assessor shall be obtained as to all

Dhalamini v. *R.*, the Privy Council in a civil appeal from the Gold Coast (now Ghana) *Kwame Kwanin* v. *Kojo Ewuah*[14] said:

> "In that case, however, the relevant enactment positively required that opinions should be given in open court. There is no corresponding requirement in the Civil Procedure Ordinance of the Gold Coast. Their lordships have not been able to discover any reason for thinking that, even supposing the facts to be as stated in the appellant's grounds of appeal, the conduct of his case was prejudiced at the trial or his right of appeal impaired. In those circumstances their lordships do not propose to take any further action on the point suggested. They think it desirable, however, to invite the attention of the legal authorities in the Gold Coast to the point that has been raised. Prima facie at any rate it seems incongruous that any material, such as an assessor's opinion, which ostensibly forms part of the record of a trial should not be available to the parties before or at the time when judgment is given. It may well merit consideration whether procedure on this point needs further regulation, so that for the future no doubts can arise on the point."

It is submitted, however, that in a criminal trial in Sierra Leone failure of the assessors to give their opinions in open court would almost inevitably be fatal to a conviction, for the Privy Council expressed the view in *Dhalamini's* case that "*Prima facie, the failure to hold the whole of the proceedings in public must amount to such disregard of the forms of justice as to lead to substantial and grave injustice within the rule adopted by this Board when dealing with criminal appeals.*"

Again, in England it is the jury who return the verdict and such verdict is recorded by the judge. In West Africa it is the judge who gives the decision but it is his duty to elect and record the opinions of the assessors before giving the decision. It is submitted that in view of the Privy Council's refusal to grant special leave to appeal in the case of *Bansel* v. *R.*,[15] a case from East Africa, where the ground of appeal had been the failure of the judge to record the opinions of the assessors, such failure on the part of the trial judge does not vitiate the proceedings. In that case, however, the opinions had indeed been elicited in the form of questions by the judge, which the assessors answered.

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matters arising thereupon which, in the case of a trial by jury, would be left to the decision of the jurors, and such opinions shall be given orally and shall be recorded in writing by the court."

[14] (1956) 1 West African Law Reports, p. 10 at p. 14.

[15] *The Times*, London, March 15, 1960.

Once the jury have returned their verdict, and judgment entered they are discharged, and judgment cannot be entered until the jury have given their verdict. In *Bansel* v. *R.*, already cited, counsel for the petitioner had also contended that until the assessors' opinions had been recorded by the judge, he was not in a position to give judgment. What is contended here is that the judge is not in a position to give judgment until the opinions of the assessors had been given, whether recorded or not.

In *Basma* v. *R.* (unreported),[16] the appellant had pleaded not guilty and assessors had been summoned and sworn. The trial was adjourned and at the adjourned hearing the appellant changed his plea from "not guilty" to "guilty." This was precisely what happened in the English case of *R.* v. *Heyes*,[17] which was cited by counsel for the appellant in the West African Court of Appeal. The West African Court of Appeal refused to entertain the appeal and distinguished *R.* v. *Heyes* in this way:

> "In the case of *Heyes*, he changed his plea of not guilty to one of guilty after he was given into the charge of the jury and, without any verdict taken, he was sentenced; the conviction was therefore quashed on the ground that the trial was a nullity."
>
> "The fundamental point in *Heyes* is that he was in the charge of the jury; that case does not assist the appellant for his learned counsel concedes that in a trial in the protectorate the defendant is not given into the charge of the assessors."

It is true that the Court of Criminal Appeal in *Heyes*' case said that "once a prisoner is in charge of a jury he can only be discharged by the verdict of the jury." In England, where the accused pleads guilty and therefore does not put himself upon his trial, he can only be discharged (if at all) by the judge. Where he pleads not guilty and puts himself on his trial, it seems he can only be discharged after all the constituent members of the tribunal are *functus officio*, that is, judge and jury. In West Africa, the constituent members are the judge and assessors. To put it in another way, it is a fundamental rule in the English criminal trial that a jury can never be discharged without giving a verdict; (to which, of course, there are certain exceptions).[18] Once a prisoner in England has pleaded not guilty he is as in West Africa deemed to put himself upon his trial. The trial in England is conducted by the judge and jury; in West Africa by the judge with the aid of assessors. If the trial cannot be concluded in England without the judge and jury, it seems that neither can it be concluded in West Africa without the judge and the assessors. In fact, where statutory provisions have been made in West Africa for the discharge of jurors they have by the same provisions been made applicable to assessors.[19]

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[16] (1959) Judgment of West African Court of Appeal (Criminal App. 37/59), delivered October 6, 1959, in Sierra Leone.

[17] [1950] 2 All E.R. 587; 34 Cr.App.R. 161.

[18] Archbold, paras. 597–601.

If it is correct to say that the facts of *Basma's* case are not distinguishable from those in *Heyes'* case, and that the same principle is applicable, it may appear to follow that the decision in the former was wrong. It is submitted, however, that *Basma's* case was rightly decided. The West African Court of Appeal said:

> " His learned counsel has argued that the procedure in a case with assessors is similar to the procedure in a jury case—which is true; for a common procedure is laid down in the Criminal Procedure Ordinance for trials in the Supreme Court. It is, therefore, sound to say that when a defendant pleads 'not guilty' he puts himself upon his trial. But here, we have a defendant who, having pleaded 'not guilty,' changed. What is, therefore, to prevent the judge from sentencing him on his own plea of guilty? Why should the judge ask the assessors for their opinions? What is there to ask their opinions about?
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> " . . . In our view it is only where there is a trial that the judge is bound to ask the assessors for their opinions. We cannot see any reason why he should consult the assessors before sentencing an accused person who pleads guilty; for there is nothing on which their opinions are needed. . . ."

The questions posed by the West African Court of Appeal are pertinent in any examination of the correctness of the decision of the Court of Criminal Appeal in England in *Heyes'* case. It is submitted that the decision of the West African Court of Appeal is preferable:

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[19] *e.g.*, s. 123 (6) (*a*) and (*b*) of the Criminal Procedure Ordinance of Sierra Leone reads:

" Where an order of the court is made under this section for a separate trial or for postponement of a trial—

(*a*) If such order is made during a trial with a jury or during a trial with assessors, the court may order that the jury or the assessors are to be discharged from giving a verdict or opinions, as the case may be, on the count or counts the trial of which is postponed, or on the information as the case may be; and

(*b*) the procedure on the separate trial of a count shall be the same in all respects as if the count had been found in a separate information, and *the procedure on the postponed trial shall be the same in all respects (provided that the jury or assessors, if any, have been discharged) as if the trial had not commenced*;"

Note the portions italicised by the writer of this article.

> " . . . when an appellate court in a colony which is regulated by English law differs from an appellate court in England, it is not right to assume that the Colonial court is wrong. It is otherwise if the authority in England is that of the House of Lords. That is the supreme tribunal to settle English law, and that being settled, the Colonial court, which is bound by English law, is bound to follow it. Equally, of course, the point of difference may be settled so far as the Colonial court is concerned by a judgment of this Board." [20]

It is hoped that this point may in the near future be discussed by the House of Lords and Privy Council.

Case and Comment [*]

ACCOMPLICE

Trial—direction to jury—misdirection by judge on liability of accomplices for incidental acts committed by one or the other

See R. *v.* SPRAGGETT, p. 840, *post.*

BETTING AND GAMING

Scots law—whether " housey housey " is an " entertainment " within Small Lotteries and Gaming Act, 1956, s. 4 (1) (2)

See BOW AND OTHERS *v.* HEATLY, p. 838, *post.*

EVIDENCE

Admissibility — previous statement not admissible as evidence of truth of matters stated therein

R. v. Golder and Others

Court of Criminal Appeal: Lord Parker C.J., Hilbery, Byrne, Ashworth and Elwes JJ.: October 17, 1960: *The Times*, October 18, 1960.[1]

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[20] *Per* Lord Dunedin delivering the opinion of the Privy Council in *Robins* v. *National Trust Co.* [1927] A.C. 515; [1927] All E.R. Reprint 73.

[*] Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For the appellants: *Robin Simpson* (instructed by Messrs. Ludlow, Head & Walter and the Registrar, Court of Criminal Appeal). For the Crown: *W. M. F. Hudson* (instructed by Messrs. Moodie, Randall, Carr & Miles for Messrs. Bankes, Ashton & Haywood, Stowmarket).

The appellants were convicted at quarter sessions of burglary and larceny. One article of stolen property was a gold watch. Before the committing magistrates a witness, Mrs. T., swore that G. had brought her the gold watch on the day after the offence. At the trial Mrs. T. went back on her story and counsel for the prosecution obtained leave to treat her as an adverse witness and cross-examined her. Mrs. T. did not admit in cross-examination that the deposition was true nor that G. had handed her the watch. The jury were directed as follows: "The only evidence which you have that he gave the gold watch to Mrs. T. is the evidence of Mrs. T. herself, and she, you may think, is a stranger to truth. You heard the evidence before the justices." And later: "If you come to the conclusion that what she said before the magistrates was accurate, then of course it all starts to tie up." On appeal to the Court of Criminal Appeal:

Held, allowing the appeal, that the conflicting testimony of Mrs. T. had been dealt with in the summing-up in a way which plainly indicated to the jury that it was open to them to act on the evidence contained in her deposition notwithstanding her repudiation of it. However, a long line of authority had laid down the principle that, while previous statements may be put to an adverse witness to destroy his credit and thus to render his evidence given at the trial negligible, they were not admissible evidence of the truth of the facts stated therein. In *R.* v. *Harris* (1927) 20 Cr.App.R. 144, and *R.* v. *White* (1922) 17 Cr.App.R. 59, the previous statements had been unsworn and not made in the presence of the accused and could not, therefore, on any view, be evidence against him. But the principle was equally applicable to earlier statements made on oath as it was to earlier statements made otherwise than on oath (*cf. R.* v. *Birch* (1924) 18 Cr.App.R. 26) and, accordingly, the present direction was wrong in law. It had been suggested that *R.* v. *Russell*, *The Times*, May 30, 1935, qualified the general principle by laying down that the jury was entitled to rely on the earlier statement if there was other evidence tending to show that it was true. That case, as this court understood it, laid down no such proposition. This court had also been referred to *R.* v. *Frett and Rosa*, unreported, tried at the Central Criminal Court in 1956. In that case the victims of a razor-slashing assault had picked out their assailants at an identification parade but, at the trial, they said they were not sure and that the defendants merely resembled their assailants. It had then been left to the jury to decide whether the original identification could be relied on. However, that case was quite different from the present case, in particular, because the victims had not been treated as adverse witnesses. In the present case the evidence, without the evidence of Mrs. T., was, as counsel for the prosecution frankly admitted, not enough to create more than a case of grave suspicion and as the jury were invited to, and probably did, act upon material which in law they were not entitled to act upon, this court was left with no alternative but to quash the convictions. [H. P.]

Commentary. Under section 3 of the Criminal Procedure Act, 1865, a party producing a witness is not allowed to impeach his credit by general evidence of bad character " but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or by the leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony." A witness is not adverse for the purposes of the Act merely because his testimony is unfavourable to the party calling him, but only if he is hostile: *Greenough* v. *Eccles* (1859) 28 L.J.C.P. 160. A hostile witness is one who shows *animus* against the party calling him, and a consequent unwillingness to tell the truth " (Nokes, *Introduction to Evidence*, 2nd ed., 133).

The reason why the previous statement is evidence only to discredit the story which the witness tells in the witness box and not evidence of the facts stated therein, is that it is technically hearsay and does not fall within any of the exceptions to the hearsay rule. A statement is none the less hearsay because it is made on oath: *R.* v. *Eriswell* (*Inhabitants of*) (1790) 3 Term Rep. 707; *R.* v. *Ferry Frystone* (*Inhabitants of*) (1801) 2 East 54. The question of the relevance of depositions put in to contradict a hostile witness was considered by the Court of Criminal Appeal in *R.* v. *Birch* (1924) 18 Cr.App.R. 26. Reliance was placed on section 5 of the Criminal Procedure Act, 1865, which deals with the cross-examination of a witness as to previous statements made by him in writing and which provides that the judge may require production of the writing for his inspection and " may thereupon make such use of it for the purposes of the trial as he shall think fit." The Crown's submission that this entitled the judge to use the deposition as evidence of the facts stated at his discretion was rejected. Avory J. said: " ' Such use ' in section 5 means, of course, such proper use as he may think fit. It does not entitle the judge to rule that the deposition is evidence against the person on trial."

It may be thought that to require the jury to consider a statement for one purpose and to exclude it from their minds for another is to ask the impossible of them; yet the English law of evidence not infrequently imposes on a jury the duty to act in such a way.

FALSE IMPRISONMENT

Evidence—mistaken identity, habeas corpus

See R. *v*. GOLDER AND OTHERS, p. 832, *ante*.

HABEAS CORPUS

Mistaken identity—false imprisonment

Ex parte Docherty

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Ashworth and Elwes JJ.: *The Times*, October 18 and 26, 1960.[2]

On October 3, 1960, a John Docherty appeared before a metropolitan magistrates' court on a charge of drunkenness. He was convicted and fined. He was then informed that there was an outstanding fine against him of £5 in default of which he was liable to serve a month's imprisonment. He denied that there was any outstanding fine against him. He was thereupon informed that on February 8, 1960, a John Docherty had been convicted of using insulting behaviour whereby a breach of the peace might have been occasioned. He denied that he was the John Docherty who had been so convicted and fined. He was then detained while police officers who had seen the John Docherty who had been convicted on February 8 were found.

Subsequently the warrant officer told the magistrate that the person who was then before the court had been identified as the person who had been before the court on February 8. The magistrate then said that it would be better to conduct the identification in open court on oath, and that was done by two police officers, a woman police inspector and a male police sergeant. The person then before the court was served with a committal warrant. The magistrate said that he saw no reason to interfere with the execution of the warrant, and the person then before the court was taken to Brixton Prison.

Subsequently, it appeared that the woman police inspector had doubts whether the two men were the same person. It also appeared that the fingerprints and the handwriting of the two men were different.

On an application for habeas corpus, it was conceded, on behalf of the Commissioner of Metropolitan Police, that a mistake had been made. It was submitted, on behalf of the Governor of Brixton Prison, that since ministerial acts were all that had taken place in the execution of the warrant after the time when the magistrate said that he saw no reason to interfere with the execution of the warrant, no point of law arises in the case.

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[2] For the applicant: *Donald Farquharson* (instructed by Messrs. Edward Fail & Co.). For the Commissioner of Metropolitan Police: *Cyril Salmon* (instructed by the Solicitor, Metropolitan Police). For the Governor of Brixton Prison: *J. R. Cumming-Bruce* (instructed by the Treasury Solicitor).

Held, that there would be an order that the applicant should be released from custody. [D. C.]

Commentary. The case is another illustration of the dangers of evidence as to identity. The Court of Criminal Appeal has declined to rule that juries should be warned as to the dangers of convicting without corroboration where the only evidence against an accused person is identification by one witness: *R.* v. *Williams* [1956] Crim.L.R. 833, where Lord Goddard C.J. said that the court would not lay down " hypothetical directions " for a jury. Yet the court has often laid down general principles which should be followed in directing juries on particular issues, and that would seem to be all that was called for in that case.

In the present case there was ample corroboration and yet the evidence was mistaken. Is not the danger much greater where there is only one uncorroborated witness? Yet a conviction by a jury on such evidence, the unreliable nature of which they probably do not recognise, is perfectly proper even where their attention has not been drawn to the risks of error. See Glanville Williams, *The Proof of Guilt* (2nd ed.), 99 *et seq.*

A serious issue of law might have been raised if the court had been asked to issue the writ merely on the ground that material had come to light casting doubt on that before the criminal court of competent jurisdiction. As it was, the decision of the criminal court was not questioned. It was the manner of the execution of the order of that court that was in issue.

HOMICIDE

Scots law—murder—provocation—culpable homicide—greater sentence than for non-capital murder

See H.M. ADVOCATE *v.* MCCRORIE, p. 839, *post.*

PUBLIC ENTERTAINMENT

Premises kept for dancing—no licence for public dancing—whether performances took place " in public "

Casino de Paris, Ltd. v. Newberry

High Court of Justice: Queen's Bench Divisional Court: Lord Parker C.J., Ashworth and Elwes JJ.: *The Times*, October 8, 1960.[3]

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[3] For the appellant: *Victor Durand, Q.C.*, and *James Burge* (instructed by Messrs. Bellamy, Bestford & Co.). For the respondent: *Paul Wrightson* (instructed by the Solicitor, London County Council).

Casino de Paris, Ltd., was convicted at Bow Street Magistrates' Court of keeping premises, known as the Casino de Paris Theatre Club, for public dancing without a licence for such purpose first obtained from the London County Council, contrary to section 16 of the London County Council (General Powers) Act, 1915, and section 55 of the London County Council (General Powers) Act, 1935. An appeal to London Sessions was dismissed.

On appeal to the Divisional Court, counsel for the appellants said that a police officer in plain clothes had heard the commissionaire employed by the club say, outside the club premises, "The show is about to start. Go upstairs, become a member, and then you can see the show." Posters indicating that the show included dancing were displayed outside the premises. If a person so solicited decided to attend the performance, that person went upstairs to the foyer, was interviewed by one of the directors of the club, filled in an application form for membership, paid 15s. as the annual membership fee, plus 10s. for a theatre ticket for the particular night in question. and received a membership card and theatre ticket. The sole question was whether the performances of dancing which took place in the club were "in public."

It was submitted on behalf of the respondent that even if the people who went in did become members of the club, this did not prevent them from being members of the public.

Held, dismissing the appeal, that the question was whether people who went into the club ceased to be members of the public when they had fulfilled the formalities which took place; that such a question was one partly of law, and partly of fact; that it seemed, on the facts, that it was quite impossible to say that the appeals committee was wrong in law in coming to the conclusion that the people who went into the club were members of the public. [D. C.]

Commentary. In *Allen* v. *Emmerson* [1944] 1 All E.R. 344, Asquith J. adopted as a "satisfactory working definition of 'public entertainment'" the following: ". . . a place open to members of the public without discrimination who desire to be entertained and where means of entertainment are provided." It would seem that "public dancing" might similarly mean dancing to which members of the public are admitted without discrimination. This, of course, leaves the question open of the meaning of "members of the public." From this point of view the case is not easily reconcilable with *D. P. P.* v. *Milbanke Tours, Ltd.* [1960] Crim.L.R. 629; [1960] 1 W.L.R. 630. In that case it was held that a service was not available to members of the public when it was offered to members of the International English Language Association although anyone could become a member of that Association simply by declaring his support for its aims and objects and paying a subscription of one guinea. Ease of membership and motive in joining were said to be irrelevant considerations.

On the other hand, it is by no means impossible or even unusual for the same words to have different meanings in different statutes, and the meaning adopted in *D. P. P.* v. *Milbanke Tours, Ltd.*, would perhaps prevent statutes like that in issue in the present case from covering the mischief at which they were aimed. It is difficult, however, to follow the court's statement that the question was one "partly of law and partly of fact." Surely all the facts were established and the only question was the meaning of the words "public dancing" in that statute; and the construction of statutes is a question of law for the court.

SCOTS LAW

Betting and Gaming—whether "housey housey" is an entertainment within the Small Lotteries and Gaming Act, 1956, *s*. 4

Bow and Others v. Heatly

High Court of Justiciary: Lord Justice-Clerk (Thomson), Lords Patrick and Strachan: 1960 S.L.T. 311.[4]

B. and Others were convicted under a local enactment of a gaming offence for conducting premises where sessions of "housey housey" were played under circumstances which complied with the 1956 Act. On appeal by stated case against conviction it was argued for them that the mere playing of "housey housey" was an entertainment within the meaning of section 4 of the Act and that they were entitled to exemption.

Held, that the playing of "housey housey" was in itself an entertainment and the appeal should be allowed.

Commentary. The general prohibition of lotteries and gaming was relieved by the Betting and Lotteries Act, 1934, s. 23, which exempts certain lotteries incidental to entertainments. The 1956 Act goes further and exempts "any entertainment . . . at which games of chance or of chance and skill combined are played" in accordance with prescribed conditions. The simple point in this case was whether the mere gaming could constitute an entertainment or whether there must be some separate entertainment to which the gaming was subsidiary.

[Report and commentary by ALISTAIR R. BROWNLIE.]

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[4] For the appellants: *Hamilton* (instructed by Dan McKay & Norwell, s.s.c.). For the respondent: *Henderson* (instructed by W. Borland, s.s.c., Town Clerk, Edinburgh).

Murder—provocation—greater sentence than for culpable homicide —non-capital murder

H.M. Advocate v. McCrorie

High Court of Justiciary: Lord Justice-General (Clyde), Lords Carmont and Sorn: October 4, 1960.[5]

M. was charged on indictment with non-capital murder of F. whom he had attacked with an axe and killed upon hearing F. boast of his adultery with M.'s wife. The trial judge charged the jury that if they accepted that M. had acted in the heat of the moment they might find him guilty of culpable homicide but if they thought that there had been time for his passions to cool they should convict of murder. The jury unanimously found M. guilty of culpable homicide. M. was sentenced to fifteen years' imprisonment. On appeal it was argued that the sentence nullified the goodwill of the jury and was harsh and oppressive: had M. pleaded guilty as libelled he could not have been sentenced to more than life imprisonment which in practice averages a term of nine or ten years.

Held, that there was no reason shown to warrant interfering with the sentence.

Commentary. This case illustrates the rule of both Scots and English law that provocation may operate to reduce the crime of murder to manslaughter. Homicide in *chaude melle* was never punished in Scotland as murder, Hume 1, 240: after the Reformation when privilege of sanctuary was abolished the plea of provocation to palliate homicide committed *in rixa* continued to receive effect. Thus, where a husband finds and kills his wife's lover in the act of adultery he is guilty of culpable homicide—Hume 1, 252. In *H.M. Advocate* v. *Hill*, 1941 J.C. 59, Lord Patrick charged a jury that where the husband learned of the adultery from the parties' verbal admissions the effect was the same. Lesbian practices may also constitute provocation: *H.M. Advocate* v. *Callander*, 1958 S.L.T. 24. The contrary English rule of *Holmes* v. *D. P. P.* [1946] 2 All E.R. 124 that a mere confession of adultery was insufficient was modified by the Homicide Act, 1957, s. 3, but the objective test of the effect of such provocation on the reasonable man —see *Mancini* v. *D. P. P.* [1942] A.C. 1—was retained. For a recent successful case of verbal provocation, see *R.* v. *Fantle* [1959] Crim.L.R. 584, and as to provocation generally, see articles in [1954] Crim.L.R. 740 and 898; [1958] Crim.L.R. 778; and [1960] Crim.L.R. 5, at p. 10.

Before the Scottish appeal court can interfere with a sentence it must be shown to go beyond what is usual and necessary: *O'Reilly* v. *H.M. Advocate*, 1943 J.C. 23. In the present case the court acted on the footing that the Secretary of State has power to review long sentences. Under the Prisons (Scotland) Act, 1952, s. 21, he may at any time release on licence persons sentenced to life imprisonment: *cf. R.* v. *Grantham* [1955] Crim.L.R. 386. Newsam, *The Home Office*, p. 118, indicates that the average period of detention under life sentence amounts to only nine or ten years though some prisoners are detained for longer periods. It is thought that these factors should generally be ignored by the court in considering sentence.

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[5] For the appellant: *Fairbairn* (instructed by Keir Moodie & Co., s.s.c., for D. M. & T. L. Rollo, Solicitors, Cupar). For the Crown: *Anderson, Q.C., Sol.-Gen., Cowie, A.-D.* (instructed by Lionel I. Gordon, Crown Agent).

[Report and commentary by ALISTAIR R. BROWNLIE.]

SEXUAL OFFENCES

Verdict—rape charged on indictment—verdict of indecent assault brought in by jury

See R. *v.* TOUHEY, p. 843, *post.*

TRIAL

Jury—misdirected by judge on liability of accomplices for incidental acts committed by one or the other

R. v. Spraggett

Court of Criminal Appeal: Lord Parker C.J., Ashworth and Elwes JJ.: October 4, 1960.[6]

S. was convicted at Assizes of burglary and assault with intent to rob. The facts were that three men were involved in breaking into a sub-post office. Two of the men had gone into the premises and one had remained outside. The only evidence connecting S. with the offence was that he was later seen in a grey van, which admittedly had been used for the offence. In the course of the burglary the owner of the shop came on the scene and was knocked down. On the question of the accused acting in concert with others to use violence, the direction to the jury was as follows: "If two or more persons are concerned in the commission of a crime . . . the incidental commission of the various acts which may go to constitute the crime are the acts of all of them, though one may do one thing and another do another. . . . You may take this from me, that if two or more persons decide that they are going to break into some premises at night, in other words, burgle some premises, and one goes in one way and another goes in another way, and one of them in the course of his progress on to the premises finds that he is met by the occupant and he knocks that occupant out, the blow that knocks the occupant out is not only the blow of the man who administers it, but also the blow of the man with him and carrying on the job in some other place, so you need have no difficulty about that." On appeal to the Court of Criminal Appeal against the conviction of assault with intent to rob:

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[6] For the appellant: *J. Burge* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Anthony Harmsworth* (instructed by the Town Clerk, Hove).

Held, allowing the appeal, that before the jury could convict the appellant of assault with intent to rob they had to be satisfied that he and the other two had the preconceived intention of using violence to resist arrest or any interference with the burglary. The summing-up really treated as a presumption of law that where a man was found to be acting in concert with others to commit a burglary it should be presumed that he was also acting in concert with others to use violence in the course of the crime. The jury had to be satisfied by evidence that such a preconceived intention of using violence existed and the passage [cited above] in the summing-up withdrew that matter from them and was clearly a misdirection. This court saw no alternative but to quash the conviction although, of course, the conviction for burglary stood.

[H. P.]

Commentary. The direction of the trial judge would have imposed on accomplices in one crime liability for other and perhaps much more serious criminal acts, for which they had no *mens rea*. Under such a rule a burglar who had no intention to do anything to anyone, might have found himself guilty of murder.

Murder — two informations charging same offence, in operation together—whether nolle prosequi entered in respect of first affected the second information—Criminal Procedure Code of Kenya, s. 82

Poole v. The Queen

Judicial Committee of the Privy Council: Lord Tucker, Lord Denning and Lord Morris of Borth-y-Gest: [1960] 3 W.L.R. 770.[7]

P. was committed for trial by a magistrate on a charge of murder. He was arraigned on an information, signed on behalf of the Attorney-General, before the Supreme Court of Kenya. After counsel for the Crown had opened the case, but before any evidence had been called, a juryman stated that he had a conscientious objection to returning a verdict of guilty. The trial was adjourned.

During the adjournment the acting senior Crown counsel, on behalf of the Attorney-General, signed a fresh information, charging P. with murder in the same terms as the first information.

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[7] For P.: *F. H. Lawton, Q.C.*, and *Harold Cassel* (instructed by Merriman, White & Co.). For the Crown: *L. G. Scarman, Q.C.*, *J. G. LeQuesne* and *K. C. Brooks* (instructed by Charles Russell & Co.).

After the adjournment, counsel for the Crown entered a *nolle prosequi*, and, at the same time handed in the fresh information. P., having been immediately discharged in respect of the charge for which the *nolle prosequi* had been entered, was thereupon served with the new information. He was subsequently tried on the new information and convicted.

On appeal against conviction, it was contended that on the true construction of section 82 of the Criminal Procedure Code of Kenya the entry of the *nolle prosequi* brought the prosecution to an end, subject always to the right of the Crown to start another prosecution against him *de novo*.

Section 82 of the Code provides that " In any criminal case and at any stage thereof before verdict or judgment . . . the Attorney-General may enter a *nolle prosequi* . . . by stating in court . . . that the Crown intends that the proceedings shall not continue, and thereupon the accused shall be at once discharged in respect of the charge for which the *nolle prosequi* is entered ; . . . but such discharge . . . shall not operate as a bar to any subsequent proceedings against him on account of the same facts."

Held, dismissing the appeal, that on a proper construction of the section, the only proceedings which were discontinued as a result of the entering of the *nolle prosequi* were the proceedings under the information in respect of which it was entered ; that if the second information took effect from the date of the signature it was not rendered invalid by the existence at that moment of the former information ; and that if the second information only took effect when filed, it was valid from that moment, and was unaffected by the entry of the *nolle prosequi* in respect of the first information.

Held, further, that although there was nothing in the Criminal Procedure Code of Kenya which expressly prohibited or authorised the existence at the same time of two informations against the same person for the same offence on the same facts, such a situation was not inherently bad at common law ; but the court would not allow an accused person to be tried on both indictments. Accordingly, the second information was not inherently bad by reason of the pendency of the earlier one for the same offence against P. on the same facts. [D. C.]

Commentary. Though the case is primarily concerned with the construction of the Criminal Procedure Code of Kenya, it is important also for its examination of the common law and appears to be the only modern authority on the point in issue.

VERDICT

Rape charged on indictment—verdict of indecent assault brought in by jury

R. v. Touhey

Court of Criminal Appeal: Lord Parker C.J., Ashworth and Elwes JJ.: October 17, 1960.[8]

T., having been charged with rape, was convicted at a Crown Court of indecent assault. The facts were that T. picked up a young girl in his car and drove to a nearby lane. He then started to kiss her and to behave indecently towards her. After about four-and-a-half hours he had intercourse with her, and the question for the jury was whether the girl had consented. After the jury had been considering their verdict for some eighteen minutes, they returned and asked whether they could bring in an alternative verdict of indecent assault. They were then directed that they could do so if they were satisfied that all that had happened was in effect one incident and not a series of incidents. On appeal to the Court of Criminal Appeal:

Held, allowing the appeal, that it appeared unfortunately that the jury had been in court when a previous case of rape had been tried, when an alternative verdict of indecent assault had been brought in. Up to the point when the jury asked their question nobody, counsel or judge, had considered the idea of a conviction for indecent assault. The question was whether the learned judge was right to leave the question of indecent assault to the jury at all. This was a case where it was admitted both by the complainant and by the appellant that penetration had taken place, and the sole issue was consent or no consent. On these facts this court had concluded that the alternative verdict of indecent assault ought not to have been left to the jury. Indecent assault was an alternative verdict which the jury could return where they were not satisfied that penetration had taken place; it was not an alternative where the issue was consent or no consent because no consent must be shown both in a case of rape and indecent assault. On the facts of the present case, if the prosecution desired to show that in the course of the preliminaries leading up to that penetration there was an indecent assault without the girl's consent (and here on the appellant's own statement he was using force and acting without the girl's consent), then they must lay a separate charge to that effect. This court had regretfully concluded that the conviction had to be quashed. [H. P.]

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[8] For the appellant: *J. Jaffe* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *G. J. Bean* (instructed by the Town Clerk, Southport).

Commentary. The court's regret is understandable for they were quashing a conviction for indecent assault although they were apparently quite satisfied that such an assault had been committed and that there was evidence on which a jury could so find—but not on this indictment. The difference between the case where the jury are not satisfied that there was no consent and that where they are not satisfied that there was penetration would seem to be that in the former the final act, because of the consent, is not a crime at all; whereas in the latter the incident constitutes a criminal assault from beginning to end. In the present case, the very act charged was not a crime if the jury were not satisfied that there was no consent and the fact that the jury were satisfied that it had been preceded by an indecent assault was irrelevant. The act constituting the indecent assault was not the act charged. If this is a correct analysis, it would seem clear that no defence of *autrefois acquit* would be available to the accused on a charge of indecent assault.

Would it not, however, have been a more satisfactory result if the court had held that there was evidence on which the jury could hold —as, it would seem, they did—that the whole affair was one transaction and not a " series of incidents "?

Principles of Punishment

Sentences in the Court of Criminal Appeal

Prepared by HENRY PALMER, *Barrister-at-Law*

Buggery

In R. *v.* SCARROTT the court (Lord Parker C.J., Ashworth and Elwes JJ.; October 4, 1960) confirmed a sentence of fourteen years' imprisonment. S. had pleaded guilty at assizes to three offences of buggery, one of attempted buggery and two of indecent assault, the victims being six schoolboys between the ages of eight and eleven. S., who was a man of thirty-eight years of age, had seven previous convictions, of which four were for offences of indecency. He was fined in 1946 for indecent assault on a boy. In 1948 he was sentenced to two years' imprisonment for two similar cases. He was then put on probation in 1949 for two offences of buggery and five offences of indecent assault on male persons. Finally, in 1950, he committed a further indecent assault on a boy of twelve, he was in breach of probation, and was sentenced to ten years' imprisonment for the offence and two years consecutively for breach of probation. The court stated that S. was a danger to society and must be put away. Preventive detention had not been imposed because the notices were not in order, and this court could see nothing wrong in principle with the sentence of fourteen years' imprisonment.

Obtaining goods by false pretences

In R. *v.* MELLOR the court (Lord Parker C.J., Ashworth and Elwes JJ.; October 10, 1960) reduced a sentence of six years' preventive detention to one of three years' imprisonment. M. had pleaded guilty at a magistrates' court to obtaining goods by false pretences and, after committal for sentence, was sentenced by quarter sessions where eight other offences were taken into consideration. The offences were committed when M. obtained petrol and oil from a garage by presenting an agency card made out in the name of a firm. Five of the offences taken into consideration were similar cases, the remaining offences being larceny as bailee involving about £350. M., who was a man of thirty-one years of age, had previously committed about seventy-three offences in all, mainly of false pretences, shopbreaking, larceny and embezzlement. He had been on probation, to prison and to corrective training. The court stated that it was quite clear that, if M. went on as he was now going, he would undoubtedly end up with a long period of preventive detention. However, he was only just past the qualifying age and, in addition, for a period of about a year had shown that he could keep out of trouble. On the whole this court felt that he should be given one last chance to pull himself together and, accordingly, a sentence of three years' imprisonment would be substituted for the sentence of six years' preventive detention (which, in any event, was not a proper sentence of preventive detention).

Shopbreaking

In R. *v.* SALMON the court (Lord Parker C.J., Ashworth and Elwes JJ.; October 5, 1960) varied a sentence of three years' corrective training to one of three years' imprisonment. S. had pleaded guilty at quarter sessions to two offences of being accessory after the fact to shopbreaking and larceny. S., who was a man of twenty-seven years of age had two previous convictions; he was fined for garage breaking and larceny and, in 1957, sentenced to one month's imprisonment for larceny of a duffle-coat. The court stated that the offences were serious and, according, to the police evidence, involved professional safe-breaking. The offences, therefore, called for a penalty of the degree imposed. However, S. had in the past earned very substantial wages of between £25 and £40 a week as a steel erector and was accordingly equipped to earn good money in a trade in which he was an accomplished practitioner. In those circumstances, corrective training was not the appropriate form of penalty and the sentence would, therefore, be varied to one of three years' imprisonment.

Wounding

In R. *v*. JOHNSON the court (Streatfeild, McNair and Davies JJ.; October 3, 1960) reduced a sentence of eight years' preventive detention to one of five years' imprisonment. J. had been convicted at a Crown Court of wounding a young woman with intent to do her grievous bodily harm. The offence was committed when J. called upon the young woman, with whom he had previously been living, and in the course of a quarrel struck her with his fist and then with a knife. J., who was a man of thirty-four years of age, had fifteen previous convictions. The court stated that J.'s record showed clearly that he was a persistent thief and housebreaker. However, the only previous conviction of any kind of violence was a conviction of common assault in 1955; and that assault appeared to have been not with a knife but with a fist. In those circumstances the appropriate sentence was one of five years' imprisonment.

Acts and Orders[*]

Animals

The definition of disease in section 84 of the Diseases of Animals Act, 1950, is extended so as to include African horse sickness (*Pestis equorum*); the importation into Great Britain of horses from countries believed to be affected with such disease is prohibited; and minor consequential amendments are made to the Importation of Horses, Asses and Mules Order, 1957 (S.I. 1957/467). Operative September 27, 1960. IMPORTATION OF HORSES, ASSES AND MULES (AFRICAN HORSE SICKNESS) (PROHIBITION) ORDER, 1960 (S.I. No. 1721) (3d.).

For penalties for contraventions see section 7 of the Diseases of Animals Act, 1950.

Previous Orders declaring separate parts of England eradication areas for the purposes of tuberculosis control are revoked and the whole of England and Wales, subject to the exceptions specified in the Order (certain landing stations, quarantine stations and reception places) is declared to be an attested area for these purposes. The whole area will continue to be subject (as it was under the revoked Orders) to the provisions of the Tuberculosis (Area Eradication) Order, 1950 (S.I. 1950 No. 2006, as amended) which amongst other things prohibits movement of cattle into an attested area except under licence on certain journeys. Operative October 1, 1960. TUBERCULOSIS (ENGLAND AND WALES ATTESTED AREA) ORDER, 1960 (S.I. No. 1708) (3d.).

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[*] Prepared by F. Maurice Drake, *Barrister-at-Law*.

For penalties for contraventions see section 7 of the Diseases of Animals Act, 1950.

Exchange Control

The list of banks and other persons authorised to deal in gold and foreign currency, and the list of authorised depositaries for the purpose of the deposit of securities under the Exchange Control Act, 1947, are revised. Operative October 7, 1960. EXCHANGE CONTROL (AUTHORISED DEALERS AND DEPOSITARIES) (AMENDMENT) ORDER, 1960 (S.I. No. 1783) (2d.).

For penalties for contraventions see Schedule 5 to the Exchange Control Act, 1947.

Gaming and Wagering

BETTING AND GAMING ACT, 1960 (8 & 9 Eliz. 2, c. 60). The main provisions of this Act are based on the recommendations of the Royal Commission on Betting, Lotteries and Gaming, 1949–51 (Cmd. 8190), and relate to the licensing and registration of bookmakers; the authorisation and registration of agents; the establishment of licensed betting offices; the increase of penalties for street betting; betting transactions with persons under eighteen and the employment of such young persons in effecting betting transactions or in a licensed betting office; the amendment and extension of the powers and rights of the Racecourse Betting Control Board; the extension of the powers and rights of occupiers of licensed dog racecourses; and the replacement of the existing law of gaming by new provisions.

Part I (*ss.* 1 *to* 14): *Betting*

Section 1 repeals the Betting Acts, 1853 and 1874, which prohibited the use of places for the purpose of betting with persons resorting thereto or for ready money betting, including money sent by post, and so far as it relates to betting, section 407 of the Burgh Police (Scotland) Act, 1892. Section 1 (2) provides that premises shall not be used for betting with persons resorting thereto except as permitted by the Racecourse Betting Act, 1928 (relating to approved horse racecourses (s. 1 (1) of this Act)), by the Betting and Lotteries Act, 1934 (relating to tracks other than approved horse racecourses (s. 12 of this Act)); or by section 4 (1) of this Act (relating to licensed betting offices). The prohibition on the use of premises for betting does not apply to premises used for betting between persons who either reside or work on those premises, or to premises used only by the holders of bookmakers' permits and their agents. Section 1 (3) contains penalties for resorting to premises for the purpose of betting.

The restriction on ready money betting in the 1853 Act is not reproduced. The Act establishes licensed betting offices to which persons may resort for the purpose of betting with the holder of the licence or his servant or agent (s. 4).

A betting office licence authorising the use of premises for betting between the licence holder and persons resorting to the premises may only be granted to the holder of a bookmaker's permit, to the Racecourse Betting Control Board, or to an accredited agent of either of them, and an accredited agent must himself hold a betting agency permit (s. 4) before being granted a betting office licence.

A licensed betting office must be managed in accordance with Rules set out in the Second Schedule, and restrictions are imposed on the advertising of a licensed betting office (s. 5).

A person acting as a bookmaker on his own account must hold a bookmaker's permit (s. 2), and with certain exceptions a person receiving or negotiating bets by way of business on behalf of another bookmaker or the Racecourse Betting Control Board must be authorised in writing by his principal who must keep a register of persons authorised. An agent's written authority, or a register of persons authorised, must be produced to a constable for inspection if required (s. 3).

The First Schedule to the Act contains provisions relating to the grant, renewal, etc., of bookmakers' permits, betting agency permits and betting office licences by a Committee of Justices in England and Wales and by a licensing court in Scotland. Section 8 contains provisions relating to the cancellation of such permits, and disqualification for holding a permit of either description on conviction for certain offences.

Offences by holders of bookmakers' permits or betting agency permits are contained in section 9.

By section 6 the penalties for street betting contained in the Street Betting Act, 1906, s. 1 (1), are increased with effect from a day to be appointed which will be at least six months after the provisions relating to licensed betting offices come into force.

Betting transactions with a person under 18 years of age, employment of such a person in effecting a betting transaction or in a licensed betting office, or receiving or negotiating a bet through any such person, are prohibited by section 7, subject to certain exceptions in connection with betting transactions effected by post. The provisions prohibit the employment of persons under 18 in receiving bets by telephone.

Section 10 requires the clerk to the authority responsible for granting permits and licences to furnish certain information relating to permits and licences to the Secretary of State, who must lay an annual report before Parliament in connection therewith.

Section 11 amends the powers, rights and duties of the Racecourse Betting Control Board and gives the Board the exclusive right to carry on pool betting and to receive or negotiate bets at totalisator odds on recognised horse races. No penalties are provided for infringing the Board's rights which are enforceable only by civil action.

Section 12 grants similar exclusive rights in connection with pool betting and betting at totalisator odds on dog races to the occupiers of dog race tracks.

Sections 13 and 14 amend the Pool Betting Act, 1954.

Part II (*ss.* 15 *to* 22): *Gaming*

Section 15 repeals the existing law with regard to gaming, unlawful games and common gaming houses.

Gaming as defined in section 28 (1) is lawful only if it is conducted in accordance with the conditions set out in section 16, but gaming may not take place in any street or in other places to which the public have access (s. 18) except at certain entertainments not promoted for private gain (s. 20), and the playing of dominoes and cribbage is permitted in licensed premises (s. 19).

Gaming by means of machines (*e.g.*, " fruit machines ") not exceeding two in number is lawful on certain premises to which the public do not have access and which are not used wholly or mainly by persons under eighteen (s. 17).

Section 21 provides that a lottery which is also a game of chance shall be lawful providing the gaming is conducted in accordance with Part II of this Act. Pool betting and certain lotteries are deemed not to be gaming (s. 21 (4)).

By section 22 local authorities are prohibited from subsidising premises used habitually for playing of games for money (*e.g.*, casinos) except certain premises where the gaming is by way only of amusements with prizes, and in respect of which a permit has been granted under the Third Schedule.

Part III (*ss.* 23 *to* 25): *Amusements with prizes*

Amusements with prizes may be provided at certain non-commercial entertainments (such as bazaars, sales of work, etc.) where the proceeds are devoted to purposes other than private gain (s. 23). Such amusements may also be provided at commercial entertainments, for instance in amusement arcades (which require a permit from the local authority in accordance with the Third Schedule), and at travelling fairs, providing the premises on which such a fair is held are not used more than 28 days a year for the purpose.

Section 24 removes all restrictions from certain amusement machines of an innocuous character.

Part IV (*ss.* 26 *to* 31): *Miscellaneous and General*

Section 26 makes amendments to certain enactments in relation to the playing of games on licensed premises, etc.

Section 27 relates to enforcement of the provisions of the Act, the issue of search warrants, seizure and removal of documents, and powers of arrest, and contains penalties for offences for which specific provision is not made elsewhere in the Act. Section 27 (2) contains penalties for using premises in contravention of the Act.

Other matters include interpretation (s. 28), amendments and repeals (s. 29 and Fourth, Fifth and Sixth Schedules), expenses (s. 30) short title and commencement (s. 31).

The Act received the Royal Assent on July 29, 1960, and comes into force as provided for by the BETTING AND GAMING ACT, 1960 (COMMENCEMENT NO. 1) ORDER, 1960 (S.I. No. 1556) (3d.). Part I (ss. 1–14) and Sched. I are operative May 1, 1961, with the exception of section 6 which is to come into operation on a day to be appointed, and with the following exceptions: sections 2 (2), 4 (2) (3) (4), 8, 10, Sched. I, were operative September 30, 1960; section 3 is operative June 1, 1961; ss. 13, 14, operative August 1, 1961; Part II (ss. 15–22) and Sched. VI, Part I, are operative January 1, 1961, save that section 19 (5) was operative September 30, 1960; Part III is operative January 1, 1961, except Sched. III which was operative September 30, 1960; Part IV was operative September 30. Sections 26, 29 (1) and Sched. IV (in so far as they amend s. 11 of the Gaming Act, 1845), 29 (2) and Sched. V, para. 4 (in so far as they amend section 23 (1), 24 (3) of the Betting and

Lotteries Act, 1934, and section 1 (3) of the Small Lotteries and Gaming Act, 1956), and section 29 (3) and Sched. VI, Part II (in so far as they relate to the Gaming Act, 1845, and the Small Lotteries and Gaming Act, 1956 (Amendment) Act, 1959) are operative January 1, 1961. Subject as aforesaid section 29 (1) (2) (3), Scheds. IV, V, VI, Part II are operative May 1, 1961.

Regulations made under the provisions of the Betting and Gaming Act, 1960, prescribe the manner in which Betting Licensing Committees (responsible under the Act for the grant and renewal in England and Wales of bookmakers' permits, betting agency permits and betting office licences) are to be constituted and the forms to be used in connection with the matters dealt with by such committees. Operative September 30, 1960. BETTING (LICENSING) REGULATIONS, 1960 (S.I. No. 1701) (6d.).

London Traffic

The following Orders have been made detailing prescribed routes: S.I. Nos. 1720 (Stepney) (2d.); 1734 (Holborn) (3d.); 1735 (Shoreditch) (2d.); 1773 (Esher) (2d.); 1776 (St. Marylebone) (2d.); 1779 (Barking) (2d.); 1780 (Chelsea) (2d.).

The following Order has been made relating to weight restriction: S.I. No. 1774 (Leatherhead) (2d.). The following Order has been made prohibiting cycling on footpaths: S.I. No. 1781 (Staines) (2d.). The following Order has been made prohibiting waiting: S.I. No. 1775 (Beaconsfield) (3d.).

Certain restrictions with regard to waiting, loading and unloading and on the use of vehicles for the purposes of advertisement in certain streets, which were imposed under the London (Waiting and Loading) Regulations, 1958 (S.I. No. 1093), as amended, now no longer apply in certain streets in Holborn. In the streets where these restrictions no longer apply other restrictions on vehicles as to waiting, loading and unloading now have effect by virtue of the London Parking Zones (Waiting and Loading) (Restriction) (Amendment) Regulations, 1960 (S.I. No. 1737, see below) or the Parking Places (Holborn) (No. 1) Order, 1960 (S.I. No. 1132). Operative October 3, 1960. LONDON (WAITING AND LOADING) (RESTRICTION) (AMENDMENT) (No. 4) REGULATIONS, 1960 (S.I. No. 1736) (3d.).

The principal Regulations (S.I. 1960, No. 594) are amended, principally by making them complementary to the Parking Places (Holborn) (No. 1) Order, 1960 (S.I. 1960 No. 1132). The effect is that certain restrictions on waiting, loading and unloading and on the sale of goods from vehicles now apply in certain parts of streets in Holborn which are not designated as parking places where parking meters may be installed. Operative October 3, 1960. London Parking Zones (Waiting and Unloading) (Restriction) (Amendment) Regulations, 1960 (S.I. No. 1737) (6d.).

Mental Health

From November 1, 1960, when this Order takes effect, all the provisions of the Mental Health Act, 1959, will be in operation. Mental Health Act, 1959 (Commencement No. 3) Order, 1960 (S.I. No. 1698) (2d.).

Scotland

Regulations made under the provisions of the Betting and Gaming Act, 1960, prescribe the forms to be used in connection with the grant and renewal of bookmaker's permits, betting agency permits and betting office licences and the cancellation of bookmaker's permits. Certain provisions are also made relating to registers of permits and licences. Operative September 30, 1960. Betting (Licensing) (Scotland) Regulations, 1960 (S.I. No. 1748) (6d.).

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 11 New Fetter Lane, London, E.C.4." The questions of readers only are answerable in the Review. All questions should be submitted in triplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

73. *Larceny*

Case A

On July 2, 1960, two brothers, aged fourteen years and eleven years, went from village "A" where they reside to nearby village "B." At village "B" they stole four blank postal orders, value £2; £1; 10s. 8d.; and 9s. 8d. from an unattended motor-car. All the postal orders were stamped with the office of issue, namely, the sub-post office of village "A."

The boys cashed the two postal orders of lesser value at the sub-post office of village "B" the same afternoon, and took the £2 and £1 postal orders home and handed them to their mother, telling her they had found them. The mother took possession of the two postal orders and admits that at that time she believed the boys had genuinely found the postal orders and she immediately formed the intention of using the postal orders for her own benefit.

The next day (Sunday) she wrote in the payee's name and sent the £1 postal order to Plymouth in payment of a hire-purchase account instalment with a firm of furnishers. The day after (Monday) she sent the younger boy to the sub-post office of village " A " with the £2 postal order on which she had merely signed her true name in receipt, in order that he might cash it for her.

The sub-postmistress realised that this was one of the postal orders which had been reported missing by loser and in order to gain time told the boy, falsely, that the postal order bore no stamp of the issuing office and instructed him to go home and ask his mother where the postal order had come from. The boy did this and the mother told her son to tell the sub-postmistress that she had received it from her daughter at Stoke-on-Trent.

When the boy returned to the post office, he was interviewed by a police officer (who had been summoned by the sub-postmistress) and the true circumstances came to light as a result of subsequent police inquiries.

Case B

On August 21, 1960, a man left a camera and accessories valued together at £40 on a beach where he had spent the afternoon.

He realised the following morning he had left this property where he had been sitting on the beach and returned to collect it. He found it had gone and reported the property as " lost " to the police. It would appear, therefore, that the camera, etc., was " misplaced " rather than " lost " property.

On September 8, 1960, information was received by the police that a woman had offered an expensive camera for sale at a local shop but the shopkeeper declined to buy it. The woman and her husband were interviewed by the police and asked to account for their possession of the camera which they produced. At first both explained the property had been given to them by the wife's sister in January 1959 when she emigrated to Australia. They persisted in this explanation but after further questioning admitted that whilst visiting a nearby beach on August 21, 1960, their eleven-year-old daughter, who was playing nearby, came to them and handed to them the camera having found it on the beach.

Both stated how they straightaway placed the property in their bag and took it home with them without making any inquiries to trace the owner and both made statements under caution admitting they realised at the time of receipt from their daughter, who acted quite properly in this case, that the owner could probably be traced if they had taken reasonable steps (reporting the matter to the police) having regard to the obvious value of the property.

Both the husband and wife admit equal liability in this matter, they acted together in " receiving " it from their daughter, the husband kept it at home until giving it to his wife to sell and both initially told lies in explaining their possession of the property concerned. [J. N.]

ANSWER

Case A

Assuming that there is proof of mischievous discretion both boys are guilty of larceny. It might also be said that they obtained cash by the false pretence that they were entitled to postal orders.

As for the mother, assuming that she thought that the boys had found the postal orders, she cannot be guilty of receiving stolen goods, because there was nothing in the circumstances to suggest they had been stolen, by finding or otherwise.

It might be said that she is guilty of stealing by finding on the *Walters* v. *Lunt* principle (see Case B, below), but since the postal orders were blank, she could say with a fair amount of conviction that she did not know how the true owner could be found. If this is believed it is a complete defence. Mere misappropriation of a found article without this knowledge is not a crime. The fact that she tells lies about the postal order tells against her, but they could be explained on the grounds that she, believing herself entitled to the postal orders, had had to suggest some place of issue to satisfy post office regulations. It is not an offence to tell lies to the post office.

Case B

Nothing turns on the fact that the camera was misplaced rather than lost.

Nor does it appear to matter that the child was over eight. See *R.* v. *Young* [1955] Crim.L.R. 795, the facts of which were very similar to this one except that the child was aged fourteen. From *R.* v. *Young* it appears that *Walters* v. *Lunt* and *McGregor* v. *Benyon* govern the position. These cases lay it down that when a parent receives an article from a child knowing that the child found it, the parent is deemed to have found it himself, so that if the necessary intent exists, he is guilty of stealing by finding: see [1957] Crim.L.R. 608. It might make a difference if the child were old enough to be criminally responsible for the original taking, but here it seems impossible to see that an eleven-year-old girl has done anything other than reasonable, in handing a camera found on the beach to her mother. [D. W. E.]

Letters to the Editor

The Law versus Prostitution

Sir,

I have read Mr. A. E. Jones' article, "The Law versus Prostitution," and am shocked to find a Magistrates' Clerk holding some of the views therein expressed or implied.

It is, of course, true that "as soon as a restrictive statute is passed certain people always set to work to try to find ways round it"—but in the case of the Street Offences Act, 1959, it is surely the Puritans, rather than the prostitutes, who have succeeded in that direction. The advertisements were not a device to circumvent the law and frustrate the will of Parliament. Mr. Butler had introduced the Bill as "following exactly the recommendations of the Wolfenden Report." The Report had expressed the view that the law should not seek to abolish prostitution and had mentioned "small advertisements in shops or local newspapers" as one of the "less injurious" ways in which prostitutes might be allowed to carry on their profession. Forbidden any direct approach, even from behind a closed window, the girls are compelled to rely on the services of some sort of middlemen; but Mr. Jones declares that "it should surely be possible for the law-enforcing agencies of this country to prevent other people making a living out of prostitutes."

It is apparent that certain people in positions of authority are resolved that if Parliament will not make prostitution illegal, it shall nevertheless be made impossible; and that if Parliament, by the Street Offences Act, has not given the police sufficient powers for that purpose, then additional powers will be taken by raking up disused fragments of common law and straining the interpretation of a recent statute, the Obscene Publications Act, 1959. By this means a highly flexible weapon has been put into the hands of the police which has already served to sweep the "small advertisements" from the shop windows and is likely to be turned against any other line of communication between the prostitutes and their would-be customers.

It is deplorable that the war against prostitution should have been carried to a point which has belied Mr. Butler's assurances and made nonsense of the Wolfenden proposals. It will be worse if magistrates and their clerks become imbued with the notion that the courts have a duty, in the name of "decency," to lend support to an abolitionist policy which has no parliamentary authority.

Yours faithfully,
R. L. ARCHDALE, *Solicitor.*

Essex.

[A. E. Jones writes: "Your correspondent has misunderstood the purpose of my article. I was concerned merely to show that there is tending to arise a state of affairs which, in another way, repeats the mischief aimed at by the Street Offences Act, namely, an excessive obtruding of prostitution on the notice of the public.

Because the Street Offences Act only prohibits soliciting by prostitutes in person in public places, there is no reason to assume tacit parliamentary approval of salacious advertisements by prostitutes in public places. Neither the Wolfenden Committee nor Parliament could have had in mind the kind of advertising which has taken place; it did not develop until after the Act had come into force. So far as I have been able to observe, the small advertisements in question have not been swept from shop windows but they are beginning to be more discreetly worded. A discreet advertisement for a prostitute, like a discreet prostitute, is not a public nuisance; and I did not suggest—nor would I suggest—that penal action is practicable or desirable against either. Advertising brothels is a different matter because brothels are prohibited by law.

With regard to the "middlemen" on whom your correspondent asserts that prostitutes are now compelled to rely, I must point out that it is a serious offence against the criminal law of this country to live knowingly, either wholly or in part, on the earnings of prostitution. This may represent a Puritan attitude but I think it is the general British one. In my experience, the middlemen are exploiters of prostitutes and anxious, like all middlemen, to increase the size of their business."]

Books and Periodicals

Books received:

Hoolhouse, Crime Documentaries, 2. By Rupert Furneaux. London: Stevens & Sons, Ltd. 1960. vii and 130 and (app.) 58 pp. 18s. 6d. net.

The Machinery of Justice in England. Third edition by R. M. Jackson. London: Cambridge University Press. 1960. xiii and 396 and (index) 18 pp. 45s. net.

The Murderous Trial of Charles Starkweather. By James Melvin Reinhardt. Springfield: Charles C. Thomas. 1960. ix and 147 and (index) 3 pp.

Road Traffic Offences. Third edition by G. S. Wilkinson. London: Solicitors' Law Stationery Society, Ltd. 1960. lix and 259 and (index) 58 pp. £2 net.

Readers' digest:

Homicide: Intention in Murder: 230 *Law Times* 244.

Homicide: Intention in Murder: 230 *Law Times* 271.

Penal Reform: The use of short terms of imprisonment: 1960 *Scots Law Times* 184.

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Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the Editor, *Criminal Law Review,* 11 *New Fetter Lane, E.C.*4. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

Glossary

[Guide to pronunciation. Pronounce each syllable slowly as an ordinary English word, accenting the part in italics. Then repeat the whole phrase quickly but keep each sound distinct. Where at the end of a syllable the letter "r" appears in brackets (r), do not roll it. The letter "a" by itself is long, as in bay.]

Actus reus—guilty act [*act*-us *ree*-us].

Ad hoc—for this purpose [ad *hock*].

A fortiori—so much the more so, with greater reason [a for-she-or-eye].

Aliunde—from elsewhere [allie-undee].

Animus furandi—intent to steal [anny-mus fure-*and*-eye].

Autrefois acquit—formerly acquitted [aw-tre-foys-ackuit].

Bona fide—in good faith [*bone*-e(r) *fie*-dee].

De novo—anew [dee no-voh].

Ex hypothesi—following from this assumption [ex high-*poth*-ess-eye].

Ex post facto—by subsequent fact, retrospectively [ex post *fact*-oh].

Functus officio—having discharged his duty [*funk*-tus off-*ish*-ee-oh].

In extenso—in full [in ex-ten-so].

In rixa—in dispute.

In toto—in entirety [in toe-toe].

Ipso facto—by the mere fact [*ip*-so fact-oh].

Inter alia—among other things [in-ter *a*-lea(r)].

Mens rea—guilty mind [men's rea(r)].

Modus operandi—method of working [*mode*-us op-e-*rand*-eye].

Nolle prosequi—an act of the Attorney-General to stay proceedings [nolly prose-ek-wee].

Obiter dicta—a chance remark or saying by the way, not part of a judicial decision [*oh*-bitter *dick*-ta].

Per curiam—by the court [per cure-*ree*-am].

Per se—in itself [per see].

Ratio decidendi—the reason or ground for a judicial decision [ray-she-oh dee-sid-end-eye].

Scienter—knowledge [skee-*en*te(r)].

Transit in rem judicatam—(literally) it becomes a thing which has been adjudged [transit in rem jew-dick-*ate*-am].

Cumulative Index, 1954—1960

NOTE: (p.p.) before a page reference indicates " practical problem."

Abandonment of Animals Act, 1960 [1960] 642
Abduction [1956] 117
Abortion [1955] 722; [1956] 150; [1958] 469; [1959] 506; [1960] 760
  therapeutic [1958] 600–613
Absolute liability [1957] 810
Accessory,
  after murder [1954] 464
  after the fact [1956] 255, 489; [1959] 777
  aiding and abetting [1955] 107, 183; [1957] 803; [1958] 682; [1960] 180
  before the fact [1954] 711; [1955] 179; [1960] 759, 760
  evidence of [1958] 803
  knowledge of illegal venture [1959] 653
  receiving, in [1959] 45
  taking and driving away [1960] 711
Accident, defence of [1959] 568
Accomodation agency [1954] 373
Accomplice,
  classification of [1954] 305, 324
  constructive murder and [1954] 765
  conversation with [1960] 56
  definition of [1954] 332–6
  evidence of [1954] 305, 324–36, 622; [1955] 433; [1956] 46; [1959] 780; [1960] 189
    Court of Criminal Appeal's power [1954] 331
    court-martial, warning to [1954] 788
    jury's discretion [1954] 329
    warning to jury [1954] 326–9; [1960] 122
  grievous bodily harm [1956] 122
  incriminating statement by [1959] 284
  unsworn statement of [1960] 124
  who is [1954] 305, 324, 332
Adams, Dr., trial of [1957] 365–377, 773–786
Aden [1956] 62, 64
Administration of justice,
  amendment of [1956] 354
  N. Ireland [1956] 305–315, 466–474
Administration of Justice Act, 1956 [1956] 641
Admission. *See* Evidence.
Adoption,
  provisions relating to [1958] 699
Adoption Act, 1958 [1959] 143
Advertisements (Hire-Purchase) Act, 1957 [1957] 695
Advertising [1958] 680
Advocacy,
  bar as a profession [1956] 297–304
  justices' clerks, by [1956] 169–174
  police, by [1956] 169–174, 213
Advocacy at petty sessions [1956] 513
  advocacy [1955] 367
  appeal [1955] 490, 551
  bastardy [1955] 633
  client [1955] 12, 130, 197
  committal proceedings [1955] 155, 261, 262
  coroners' court [1955] 635
  domestic proceedings [1955] 553, 630
Advocacy at petty sessions—*cont.*
  introduction [1955] 12
  place and pleader [1955] 153
  prosecutor [1955] 426
  summary trial [1955] 298, 364
  where to plead [1955] 15, 88, 198
  witnesses [1955] 226
Affidavit [1956] 270
Affiliation orders,
  enforcement of [1954] 75, 133, 297
  official records [1957] 499
Affiliation Proceedings Act, 1957 [1957] 692
Affray [1957] 242; [1959] 293
After-care [1954] 758, 885; [1960] 230
Age, Criminal Responsibility, of [1959] 497–503
Agent,
  illegal payment [1954] 373; [1955] 180
Agriculture,
  bees, imports of [1954] 634
  fatstock prices [1954] 643; [1955] 512
  feeding stuffs [1954] 633; [1956] 61
  fertilisers [1956] 61
  first aid [1957] 546
  grass and clover seeds [1958] 406
  guaranteed prices [1957] 690
  hay and straw [1955] 324
  kitchen waste [1955] 122
  lime subsidy frauds [1955] 2
  milk [1955] 325; [1956] 63, 64, 574
  pest control [1955] 45, 121, 196, 259, 720
  ploughing ancient monument [1954] 712
  poisonous substances [1954] 633; [1955] 439; [1956] 347, 428; [1957] 329, 409; [1960] 375, 499
  potatoes [1954] 725, 873; [1955] 122, 196, 439, 440, 579; [1956] 347
  poultry premises [1956] 211
  protective clothing [1959] 44
  Scotland [1955] 54
  seeds [1955] 123; [1957] 409
  spring traps [1959] 119
  summary justice [1956] 476, 544; [1959] 44, 119
  swine, movement of [1955] 3
  threshers and balers [1960] 778
  watermark disease [1954] 945
  weeds, injurious [1958] 696; [1959] 791
  workplaces [1959] 378
Agriculture Act, 1957 [1957] 690
Agriculture Act, 1958 [1958] 696; [1959] 221
Agriculture (Miscellaneous Provisions) Act, 1954 [1954] 633, 634, 646
Agriculture (Safety, Health and Welfare Provisions) Act, 1956 [1956] 636
Aiding and abetting. *See* Accessory.
  absence during offence [1954] 711
  knowledge of facts of offence [1957] 803
  traffic offences [1959] 719
  what amounts to [1958] 682
Air Force Act, 1955 [1955] 440; [1956] 131
Air guns [1956] 374
Air navigation. *See* Civil Aviation.

Aircraft,
  offence in [1956] 417
  summary jurisdiction [1957] 801
Aliens,
  approved ports [1954] 477; [1955] 123; [1956] 347, 429; [1957] 546; [1958] 487; [1960] 141
  change of address [1958] 383
  control of [1954] 68
  deportation [1956] 547, 585
  detention places [1954] 478
  employment [1954] 477; [1960] 574
  foreign representatives [1954] 478
  landing and embarkation [1954] 477
  murder of [1954] 61
  proceedings under revoked order [1954] 709
  registration [1954] 477
  restriction [1955] 48
  summary justice [1956] 406
  visiting forces [1954] 558
Aliens' Employment Act, 1955 [1956] 131
Aliens Order, 1953 [1954] 68
  changes in [1954] 259–61
America. *See* United States
Ancient Monument,
  ploughing of [1954] 712
Animals,
  abandonment of [1960] 642
  anaesthetics [1954] 725
  attested areas [1958] 761
  carcases [1954] 635
  cat, stealing [1957] 563
  cattle, pig as [1954] 695–7
  cruelty to [1954] 634, 873; [1956] 149, 212
  dairy bull licence [1958] 487
  deer [1959] 537
  diseases,
    african horse sickness [1960] 846
    atrophitic rhinitis [1954] 858
    bees [1954] 634; [1955] 389; [1957] 329
    carcase importation [1954] 635
    Channel Islands [1957] 330, 626
    export [1956] 497; [1957] 626
    feeding in transit [1956] 638
    foot and mouth [1954] 636; [1956] 277
    fowl pest, infected areas [1958] 761
    horses [1954] 558; [1957] 329
    kitchen waste [1955] 122; [1957] 410
    myxomatosis [1958] 383
    pigs [1957] 63
    poultry [1954] 311; [1955] 195; [1956] 777, 845; [1957] 481
    semen [1955] 718
    sheep [1955] 654
    sheep scab [1954] 726
    swine [1954] 635, 725, 799; [1955] 257, 580, 654; [1958] 697; [1959] 598
    tuberculosis [1954] 635; [1955] 257, 718, 720; [1957] 259, 754; [1958] 264; [1959] 65, 302; [1960] 279, 846
    virus hepatitis [1954] 389
  dogs, ferocious [1959] 582, 792
  export [1957] 259
  hay and straw, import of [1958] 826; [1959] 377
  hunting [1957] 281
  import [1958] 406
  movement of [1960] 279
  New Forest, in [1957] 691
  noisy [1955] 252
  ponies, shipment of [1958] 696
  poultry [1959] 377; [1960] 217
  slaughter [1954] 643, 798, 873; [1955] 46, 48, 511; [1956] 220, 296; [1958] 826; [1959] 142, 792; [1960] 574, 779
  spring traps [1955] 46
Animals—*cont.*
  summary justice [1955] 639, 702; [1956] 42, 113, 186, 252, 323, 406, 476, 695, 769; [1957] 318, 463, 539, 603, 680; [1958] 383
  swine, larceny of [1954] 695–7
    rabbits [1954] 725
  transfer of functions [1955] 579
Anonymous letters [1954] 341–53
  analysis of [1954] 349–53
  types of [1954] 343–9
Appeals,
  abandonment of [1956] 257; [1957] 804
  admission under threat [1956] 47
  appellant's death [1955] 373
  case stated [1958] 112
  conviction, reconsideration of [1957] 135
  Court of Criminal Appeal, to [1954] 42, 62; [1958] 113, 471
  evidence,
    fresh [1958] 326
    further [1959] 284, 286
    suspect [1958] 42
  frivolous [1960] 250
  habeas corpus cases [1959] 720
  House of Lords, to [1955] 459; [1957] 58, 135, 559, 566–576
  law, on [1954] 760
  Privy Council, to [1954] 713, [1955] 773
  quarter sessions, to [1954] 199–201, 218, 938; [1958] 109
  reference by Home Secretary [1956] 411
  reform [1959] 546
Approved schools,
  authority responsible [1956] 827
  closing of [1954] 574; [1955] 64, 460
  contributions to [1954] 312, 395; [1955] 257, 327; [1957] 261, 331; [1959] 471; [1960] 442
  escapes from [1956] 349
  farm home [1955] 336
  girls, for [1954] 659; [1955] 626–9
  Scotland [1954] 395; [1955] 327; [1956] 356; [1957] 331
  staff of [1957] 201
  use of [1954] 841
Architects [1956] 697
Armed Forces,
  Annual Act [1954] 636
  auxiliary forces [1954] 68
  board of inquiry [1956] 429
  certificates of arrest [1956] 429, 498; [1958] 407
  civil defence [1955] 48
  death sentence [1957] 121; [1959] 221
  deserters, arresting [1957] 215
  fees [1957] 121
  field punishment [1956] 429
  foreign arrest [1954] 133, 297
  imprisonment [1957] 121
  indecent exposure [1954] 933
  jurisdiction over [1954] 788
  larceny [1955] 505; [1957] 489
  manoeuvres [1959] 143
  mutiny [1957] 542
  national service [1955] 380, 390
  naval courts-martial [1958] 195
  naval discipline [1957] 669–671, 691; [1958] 407; [1959] 65, 221
  offences against military property [1955] 181; [1957] 110
  Polish [1954] 69
  probation orders [1954] 932
  reserves [1954] 312, 636
  rules of procedure [1956] 347
  service property [1957] 110
  summary justice [1956] 42, 323
  transfer to reserve [1954] 788
  vehicle lighting [1954] 873

Armed Forces—*cont.*
  visiting forces [1954] 558, 560, 642, 647, 730, 799, 873; [1956] 703, 824; [1957] 199, 260
Army Act, 1955 [1955] 440; [1956] 131
Army and Air Force (Annual) Act, 1954 [1954] 636
Arraignment. *See* Trial.
Arrest,
  breach of the peace, for [1954] 578–92; [1955] 260
  Criminal Justice Administration Act, 1914 [1958] (p.p.) 766
  false [1955] 184
  felony, for, at common law [1954] 408–22
  Larceny Act, 1916, s. 39 [1958] (p.p.) 491
  lawful custody [1955] 373
  police, powers of [1955] 66–75, 136–147; [1960] 311
  requisites of [1954] 6–20, 396
  statutory powers of [1958] 73–84, 154–162 (p.p.) 410; [1960] 598
Arson [1954] 49; [1956] 118; [1960] 640
  caravan, of [1957] 320
  husband by [1954] 376, 541
Aspinall and the Criminal Law of Gaming [1959] 163–171
Assault,
  bar to civil action [1957] 44
  common [1955] 182
  evidence of [1955] 244
  fireworks, by [1958] 250
  husband's, on wife [1954] 219
  justification [1956] 409
  police officers, upon [1958] 680
  self-defence [1958] 252
  sterilisation [1954] 785
  summary justice [1955] 702; [1956] 113, 252, 407, 695, 769; [1957] 179, 399
  words and [1957] 219–225
Assembly,
  procession is an [1959] 283
Assizes,
  cases from [1956] 2
  committal to, for trial [1954] 291; [1956] 67
  dates of [1955] 270
  evidence at [1958] 64
  indictment, setting [1960] 357
  Lancashire [1954] 658; [1958] 340
  North Eastern [1955] 390
  notice of previous convictions [1958] 801
  private prosecution at [1954] 39–41
  Somerset [1959] 377
  witnesses' attendance [1956] 475
Atomic Energy Authority Act, 1954 [1954] 645
Atomic energy works [1954] 393; [1957] 410; [1959] 793; [1960] 642
Attempt,
  gross indecency [1954] 137; [1957] 54; [1959] 134
  impossibility [1955] 772
  larceny [1954] 140
  law of [1955] 66–70, 293, 451
  licensing laws to break [1959] 520
  murder [1959] 518
  procure, to [1959] 774
  rape [1959] 209
  sale of meat above maximum price [1954] 211
Attendance centres [1959] 143
Attorney-General,
  nolle prosequi entered by [1958] 573
Auctions,
  mock auctions [1954] 157, 815
Auditor,
  company, of [1960] 186
Australia,
  letter [1954] 274–80, 760–6; [1955] 290–7, 607–613; [1957] 389–398; [1958] 520–528; [1960] 468–477
  police notes [1954] 121–6; [1955] 26–31; [1956] 18–21
  telephone tapping in, [1960] 383
Austrian State Treaty Act, 1955 [1955] 582
Automatism, defence of [1958] 361, 440; [1959] 660
Autrefois convict [1959] 201; [1960] 775
Auxiliary Forces Act, 1953 [1954] 68
Aviation,
  carriage by air [1960] 629
  civil [1960] 644
  drunkenness in aircraft [1954] 205
  flying near assembly [1959] 283
  low flying [1954] 298
  summary justice [1955] 564, 639, 703; [1956] 42, 113, 252, 476, 544, 695, 825; [1957] 179
  wireless telegraphy [1954] 481

Bahrain [1957] 122
Bail [1955] 308, 365; [1956] 7, 119, 120, 163, 790
  Court of Criminal Appeal, in [1959] 713; [1960] 190
  criminal law, in [1959] 705–714
  failure to surrender to [1959] 48, 521
  police [1959] (p.p.) 870
  release on [1959] 707
  summary trials, in [1959] 710
Baking industry [1957] 700
Baking Industry (Hours of Work) Act, 1954 [1954] 802
Ballistics, Notes on Forensic [1959] 339–349
Ball-point pen [1955] 544–51
Bankers' books [1955] 374, 515
Bankruptcy offences [1955] 565; [1958] 185, 261; [1959] 47
Barristers,
  appearances of [1954] 75
  bar as a profession [1956] 297–304
  fees [1954] 223
  prosecuting counsel [1955] 739–48
Basutoland [1954] 945
Bechuanaland [1954] 945
Bench Warrant [1959] 48, 521
Betting,
  agent [1956] 549
  Bill [1956] 296, 513
  bookmaker's exclusion [1955] 498
  bubble-gum machine [1960] 58
  car, in [1954] 714
  fairground, in [1954] 737, 786
  gaming, and [1959] 807
  housey housey [1960] 838
  legislation as to [1954] 737
  place used for [1954] 714, 786
  pool betting [1954] 637
  prosecution of agent [1955] 182
  small lotteries [1956] 639
  summary justice [1957] 750; [1959] 282
  totalisator [1954] 638
Betting and Gaming Act, 1960 [1960] 716, 847
Bicycle, reckless riding [1956] 219
Bigamy,
  decree nisi of nullity [1958] 617
  proof of [1954] 763
Bill of indictment. *See* Indictment.
Binding over [1955] 484–489; [1956] 323; [1958] 186, 320, 405, 627, 738; [1959] 819–821, 869; [1960] 113
Birds,
  confinement in small cages [1956] 480
  eggs [1955] 391, 394, 442

- Birds—*cont.*
  - protection of [1954] 638; [1955] 325, 513, 654, 797; [1956] 66, 137, 212, 429, 498; [1957] 330, 546, 689; [1958] 265; [1959] 377; [1960] 141, 499
  - summary justice [1956] 544; [1957] 604
  - Sundays [1956] 703
- Births and Deaths,
  - registration [1955] 123
    - American forces [1954] 560
  - removal of bodies [1954] 478
  - summary justice [1955] 563
- Blackmail [1954] 79–92, 162–72, 240–6
  - advantage demanded [1954] 82–5
  - belief that money due [1954] 240–6
  - court for trial [1957] 238
  - definition of [1954] 79
  - menaces [1954] 85
  - mental state and justification [1954] 162–72
  - pressure used [1954] 85
  - punishment [1954] 80
  - threats [1954] 81, 85
    - belief that money due [1954] 240–6
    - improper kinds of [1954] 162
    - meaning of [1954] 90
    - prosecution of [1954] 165
    - publicity of [1954] 168
    - stop-list [1954] 170
- Bodily harm [1955] 316
- Book week [1954] 407
- Books and Periodicals [1954] 72, 153, 228, 317, 397, 485, 566, 650, 734, 810, 879; [1955] 58, 131, 198, 263, 331, 396, 454, 516, 588, 659, 721, 799; [1956] 68, 139, 215, 286, 362, 438, 507, 581, 653, 715, 784; [1957] 71, 136, 207, 271, 343, 421, 491, 554, 634, 704, 762, 830; [1958] 65, 140, 201, 271, 343, 413–416, 495, 563, 637, 706, 768, 830; [1959] 72, 155, 227, 306, 478, 541, 606, 680, 743, 802, 873; [1960] 69, 147, 227, 287, 380, 447, 509, 583, 649, 720, 786, 856
- Borsholders [1955] 522
- Borstal,
  - accommodation [1957] 638
  - allocation centres [1957] 564
  - committal to [1955] 378
  - detention centre, after [1956] 208
  - floating [1959] 683
  - girls [1954] 5776; [1955] 64
  - imprisonment substituted [1956] 424
  - Irishman [1955] 577
  - new [1955] 64
  - open [1955] 172; [1960] 383
  - Oxford students and [1958] 3
  - prediction studies [1955] 604–7
  - prediction tables [1954] 440
  - quarter sessions' power [1955] 37
  - results of [1954] 440
  - rules [1957] 121
  - training,
    - conditions for [1958] 178
    - guidance on subsequent sentences of, [1958] 541
    - sentence of [1957] 159, 456; [1958] 245, 317–319, 405, 485–486, 556, 759; [1959] 140, 376, 532, 665, 868; [1960] 277, 573, 640
  - summer camp [1957] 563
  - supervision at [1955] 730
  - surgery, effect of [1957] 709
  - variation of sentence [1954] 474
- Breach of the peace,
  - arrest for [1954] 578–92
  - Scots law [1959] 438; [1960] 253
  - summary justice [1958] 250; [1960] 489
- Breaking out of prison [1957] 465
- Bribery [1955] 108; [1960] 185
- Brighton Conspiracy Case, The [1958] 422–439
- British Commonwealth,
  - colonial prisoners [1958] 59; [1960] 376
  - Tanganyika [1958] 59
- British Commonwealth courts [1954] 945; [1955] 50, 442; [1956] 66; [1957] 121, 182, 185, 260, 330, 483, 825; [1960] 376, 383, 468, 748
- British legal system,
  - criticised [1959] 745
- British Transport Commission Act, 1956 [1957] 66
- British Transport Commission,
  - larceny from [1958] 471
- Broadcasting [1955] 594
- Broadmoor patients [1955] 337
- Brothel [1955] 773
  - keeping [1958] 298–306; [1959] (p.p.) 475
- Building regulations,
  - safety [1956] 771
  - summary justice [1957] 109
  - working place [1954] 789
- Burden of proof,
  - diminished responsibility [1957] 711–721
  - direction to jury [1955] 464–474, 576; [1960] 273, 630, 777
  - fitness to plead [1960] 81
  - insanity [1960] 453–460
  - insurance policy [1960] 563
  - murder, in [1959] 557–569
  - mute of malice [1957] 605
- Burglary,
  - breaking [1954] 57; [1958] 102; [1960] 712
- Bus,
  - boarding between stops [1954] 869
  - drivers and conductresses [1958] 370
- By-law,
  - annoyance, evidence of [1959] 294
  - interpretation of [1958] 385
  - noisy instrument [1958] 803
- Byrne Committee, report of [1959] 91–93

- Camera, catching thief [1957] 708
- Canadian Criminal Code [1958] 80
- Canadian letter [1956] 687–693
- Capital punishment [1954] 4; [1955] 201, 521, 732; [1956] 76, 218, 750–758, 799; [1957] 287, 397
- Car. *See* Road Traffic.
- Caravan, arson of [1957] 320
- Caravan site [1956] 372
- Carnal knowledge. *See also* Sexual offences.
  - mental defective [1954] 134; [1955] 499; [1958] 52
  - procurement for [1954] 134
  - sentence [1956] 209
  - statutory defence [1954] 49
- Carriage by air. *See* Aviation.
- Case of Ruth Ellis [1958] 781
- Case of Ernest Jan Fantle [1958] 782
- Cases stated. *See* Magistrates.
- Casement, Sir Roger [1956] 444
- Castration, voluntary [1959] 554, 590
- Cat, stealing of [1957] 563
- Catering industry,
  - minimum wage [1954] 301
- Causation in homicide [1957] 429–440, 510–521, 576–585, 702, 760
- Caution. *See* Judges Rules.
- Central Criminal Court,
  - aldermen, absence of [1958] 39
  - appointments [1959] 80; [1960] 4
  - joinder of accused [1958] 247

Central Criminal Court—*cont.*
  joinder of counts [1958] 125
  statutory offence,
    committal for [1958] 539
Certiorari [1955] 432, 774; [1956] 48, 256, 485, 828; [1957] 249, 252; [1958] 543, 684, 694, 805; [1959] 210, 367; [1960] 555
Ceylon,
  Criminal Procedure Code [1958] 548
  perjury [1956] 420
Character in issue [1955] 215–217, 774. *See also* Evidence.
Chemin de fer [1958] 546
Cheques,
  embezzlement by servant [1954] 383
  larceny and [1958] 525–528
Chief constable,
  appointment of [1958] 498, 571
Children Act, 1958 [1958] 698
Children and Young Persons,
  abandonment [1957] 182, 322
  adolescent behaviour [1957] 4
  adoption of [1959] 143, 471
  approved schools. *See* Approved schools.
  care and protection [1956] 617, 640; [1957] (p.p.) 133, 322
  cinematography [1955] 585; [1956] 138 646; [1956] 39, 249, 405
  committee on [1956] 220, 514, 722
  corroboration [1959] 654
  criminal responsibility [1954] 493–500; [1958] 805
  cruelty [1955] 335
  delinquency [1956] 803; [1958] 273
  employment [1955] 258, 731; [1956] 256
  escapes of [1956] 349
  evidence of [1954] 865; [1956] 553
  exposing to fire [1958] 467; [1959] 282
  guardianship proceedings [1954] 497
  horror comics [1954] 886
  incapacity of [1959] 439, 523
  Ingleby Committee on, 791
  indecency with [1959] 682; [1960] 643
  liaison officers [1956] 442
  maladjusted [1954] 842
  neglect of [1959] 785
  presumption of innocence [1959] 357, 439, 523
  prison, for [1957] 3
  remand homes [1956] 350
  school, failure to attend (p.p.) [1957] 205
  sexual assaults on [1960] 422
  statistics [1957] 216
  summary justice [1955] 639, 703, 768; [1956] 43, 186, 252, 407, 477, 545, 615, 695, 825; [1957] 318; [1959] 282
Children and Young Persons Act 1956 [1956] 348
Children and Young Persons (Harmful Publication) Act, 1955 [1955] 442
China, prisons in [1956] 740–750
Cinematograph Films Act, 1957 [1957] 418
Cinematograph regulation [1955] 585; [1956] 138, 371; [1957] 418, 539, 700; [1958] 268, 340; [1960] 502
City of London (Various Powers) Act, 1954 [1954] 947
Civil Aviation,
  air navigation [1954] 640, 726; [1956] 278, 350, 430, 703, 845; [1957] 122, 261, 331, 410; [1958] 136, 196, 265, 700
  colonial [1954] 640; [1955] 443; [1956] 430; [1957] 261
Civil Aviation Licensing Act, 1960 [1960] 644
Civil cases, " unlawful " in [1959] 503
Civil Defence,
  armed forces [1955] 48
  electricity undertakings [1954] 389
  gas undertakers [1954] 389
  Minister responsible [1956] 278, 573
  police [1954] 393
  transport [1954] 389
Civil Defence (Armed Forces) Act, 1954 [1955] 48
Civil proceedings, bars to [1959] 831
Clarke Hall Fellowship [1955] 402; [1957] 4
Clean air [1957] 131, 415, 486; [1958] 250, 680; [1959] 208
Clean Air Act, 1956 [1956] 645; [1957] 131
Clergy, disturbing the [1959] 391
Clerks of the peace,
  compensation to [1954] 875
  pensions [1954] 876
Coal [1955] 444; [1957] 412; [1958] 408, 700
Coal Mining (Subsidence) Act, 1957 [1957] 698
Coast protection [1959] 144
Cocos Islands [1956] 62
Coercion [1954] 448–50
Colonial Beak, Trials of [1955] 99–105, 148–53, 234–8, 261
Colonies,
  judges [1956] 646
  wireless telegraph [1954] 563
Colour,
  appreciation of [1958] 209–217
Committal for sentence,
  quarter sessions, to [1958] 111, 173
Committal on inquisition [1960] 44–55
Committal proceedings [1959] 77, 82–95; [1960] 518
  auditor [1960] 186
  director, fraudulent [1960] 759
Company,
  fraud in prospectus [1955] 40
  Magistrates' Courts Act, 1957, and the [1958] 321–324
  prevention of fraud [1958] 700
Company director,
  sentence of [1954] 221
Compensation,
  for conviction [1957] 4
  in criminal proceedings [1957] 726–740, 787–795; [1959] 185, 808
Compoundings [1959] 750, 757
Compromises [1959] 750, 822
Concept of crime, the [1959] 239, 331; [1960] 257–262
Conditional discharge [1959] 302; [1960] 441
Consideration,
  taking other offences into [1959] 18, 108, 197
Conspiracy,
  accuse, to [1956] 189
  Brighton, The [1958] 422–439
  cheat and defraud, to [1960] 358
  course of justice, to defeat [1960] 116
  direction on [1958] 436
  husband and wife [1957] 185
  indictment [1956] 829; [1959] 839
  knowledge of criminal intentions [1959] 210
  larceny and [1955] 775
  offence abroad, to commit [1956] 550; [1957] 244
  public justice, to defeat the course of [1958] 470
  public mischief [1954] 51
  quarter sessions jurisdiction [1955] 117
  separate trials [1954] 310

Constructive manslaughter [1957] 293–301
Construction of statutes,
  powers of arrest [1958] 74–84, 154–162
Consular conventions,
  France [1954] 157
Consular office [1955] 325
Contempt of Court,
  applicant in person [1954] 787
  committal for, powers of [1955] 776
  court-martial proceedings [1954] 53
  criticism of court [1955] 706
  husband's breach of order [1957] 402
  intention, lack of [1957] 466
  interference with justice [1954] 465
  magistrates' court [1954] 575
  mens rea [1956] 831
  motions for [1954] 54
  newspaper [1960] 3, 251, 265
  prejudicing fair trial [1954] 54
  reform of law [1959] 310; [1960] 295
  vicarious responsibility [1954] 465
  writ of attachment [1957] 111
Continuance of offences [1954] 149; [1955] 48; [1957] 122; [1959] 144
Continuing offence [1956] 416
Contract, larceny by a trick and [1957] 28–36, 96–104
Conviction,
  date of [1954] 202
Copyright Act, 1956 [1957] 123, 482; [1958] 701
Coroners Act, 1954 [1954] 641; [1956] 62
Coroners' courts,
  alteration of inquisition [1954] 715
  body " recoverable " [1954] 782
  committal for trial [1954] 619, 806, 951; [1955] 595
  deaths of newly born children [1957] 108
  evidence before [1956] 410, 481, 482, 551, 586
  fees and allowances [1954] 223, 640; [1956] 62
  fresh evidence [1954] 206, 373
  industrial accident and diseases [1956] 406
  inquests, American forces [1954] 560
  inquests without body [1954] 46
  jury system [1955] 733
  new inquest [1954] 206, 373, 714
  New Zealand, in [1958] 107
  Northern Ireland, in [1955] 461
  post-mortems [1955] 372, 563
  practice and procedure [1954] 46, 619, 782
  removal of bodies [1954] 478
  witnesses, allowances to [1958] 826
Corporal punishment [1954] 4, 407; [1956] 814–821; [1960] 230, 382
Corporation property [1960] 62
Corrective training [1954] 894
  basis of [1955] 576
  carnal knowledge [1956] 209
  eligibility [1959] 132
  imprisonment and [1956] 634
  imprisonment after [1954] 64, 629
  imprisonment substituted [1956] 571
  manslaughter [1954] 630
  petty theft [1955] 385
  previous convictions, of different type [1954] 309
    proof of [1954] 309, 630; [1957] 46; [1960] 61
  probation orders [1955] 119
  purpose of [1959] 192
  qualifications for [1954] 892; [1958] 178
  release on licence and [1954] 459–60
  review of sentence [1957] 158, 459; [1958] 824
Corrective training—*cont.*
  sentence of [1958] 244, 404, 484–485, 759; [1959] 62, 139, 300, 375, 468, 531, 868; [1960] 568, 641, 845
Costs,
  appeal, on [1959] 356
  criminal cases, in [1959] 481, 806
  defendant, against [1960] 187
  Divisional Court [1955] 779
  magistrates' courts [1956] 146
  prosecution, against [1960] 120
  quarter sessions at [1954] 518–21
  successful appeal [1957] 47
County court powers [1956] 641
Court of Appeal,
  extradition, jurisdiction in [1959] 53, 212
  habeas corpus [1959] 584
Court of Criminal Appeal, appeal to,
  abandonment [1957] 606
  appellant's presence [1957] 213
  application for leave [1956] 619; [1958] 775; [1960] 726
  bail [1959] 713
  breach of probation [1954] 289
  certificate of fitness [1954] 42
  fresh evidence [1954] 62; [1956] 700; [1958] 326
  ground of [1955] 773
  Home Secretary, discretion of, to refer cases to [1958] 471
  jurisdiction [1959] 583, 847
  murder cases [1957] 460
  new trial, order of 1954] 573
  no case to answer [1958] 232–241
  powers of,
    committal to quarter sessions for sentence, on [1954] 375
    evidence of accomplice [1954] 331
    new trial, to order [1954] 573
    quashing conviction [1955] 646
  prison rules [1960] 443
  procedure of [1955] 245
  quarter sessions, from [1958] 113
  reference to [1956] 411, 552; [1960] 356
  sentences in [1958] 242–246, 313–321, 402–406, 482–486, 553–557, 624–627, 758–760; 822–825; [1959] 61, 138, 219, 299, 373, 468, 529, 596, 663, 737, 865; [1960] 65, 137, 214, 275, 371, 439
  transcripts of evidence [1954] 367; [1957] 63; [1958] 408
  venire de novo [1960] 266
  verdict substituted [1958] 45
  without leave [1954] 42
Court precincts [1956] 147
Courts-Martial,
  appeal court's powers [1957] 4
  appeals, expedition of [1954] 374
  application for leave [1955] 269
  certificate of arrest [1957] 49
  comment on [1954] 53
  contempt in relation to [1954] 53
  function of court [1957] 108
  joint trial [1957] 50
  judges' rules [1956] 49
  jurisdiction of [1954] 788
  naval [1958] 195
  offence abroad [1954] 61; [1956] 698
  procedure [1956] 347; [1958] 195; [1959] 651
  quashing of accomplices' conviction [1954] 540
  restitution [1957] 553
  rules [1955] 48
  summing up [1954] 716
  time for appeal [1956] 620
  transfer to reserve [1954] 788
  visiting forces [1954] 558
  witnesses [1957] 50

Courts-Martial Appeal Court,
  fees in [1954] 223
Crime and punishment, Government view [1958] 773
Crime and Crown Privilege [1959] 10–18
Crime, the Concept of [1959] 239–249
Crime, the state of,
  in Britain [1959] 309
Criminal Appeal Rules, 1960 [1960] 715
Criminal case and comment [1958] 776; [1960] 4
Criminal Justice Administration Act, 1956 [1956] 354
Criminal Justice Administration (Amendment) Act, 1959 [1959] 798
Criminal Law Revision Committee [1959] 158, 185
Criminal procedure,
  appeal, fee on [1960] 217
  reform [1960] 294
Criminal responsibility,
  age of [1959] 497
  children [1954] 493–500
  psychopaths [1958] 500
  punishment and [1954] 661–86
  society and [1954] 841–4
Criminal statistics [1959] 611
Criminology,
  causes of crime [1954] 843
  institute of [1958] 568; [1959] 80
  International congress [1955] 3, 686–9
  International course [1954] 337–40
  study of [1957] 497
  U.S. Congress on [1960] 586
Crofters (Scotland) Act, 1955 [1955] 449
Cross-examination,
  lessons of [1957] 773–786
  previous charge, as to [1960] 420
  previous convictions, as to [1959] 358, 778
Crown,
  effect of Act on [1958] 55
  proceedings [1958] 577
Crown privilege [1956] 513; [1959] 120; [1960] 362
Crime and [1959] 10–18
Custody, questioning persons in [1959] 609; [1960] 317
Custody proceedings [1957] 659–665
Customs and Excise,
  dumping and subsidies [1957] 411, 482; [1958] 196
  export control [1954] 312, 559, 946; [1955] 195, 325, 391, 580; [1956] 278, 498, 703, 777; [1957] 64, 123, 200, 262, 547, 693; [1959] 50, 145
  forfeiture of goods [1954] 466; [1958] 786–792; [1959] 49; [1960] 121
  hydrocarbon oils [1957] 482
  import control [1954] 224, 559, [1955] 511, 654; [1956] 63, 413
  mechanical lighters [1954] 69
  precious metals [1957] 468
  spirits [1957] 693
  summary justice [1955] 639, 703; [1956] 43, 186; [1957] 318, 400, 750; [1960] 121
  vehicles [1959] 793
Cyprus, retrial [1957] 620

Dangerous driving. *See* Road Traffic.
Dangerous Drugs [1954] 69, 800, 946; [1955] 511; [1956] 573; [1958] 487; [1960] 217
  summary justice [1957] 45, 240; [1958] 383
Davenport Case [1956] 589–607, 659–673, 730–738; [1957] 640–650, 722–726
Deaf mute, trial of [1954] 3, 20–2
Deceit,
  defrauding and [1954] 136
Deer (Scotland) Act, 1959 [1959] 537
Defence, advance notice of [1959] 548–554
Defence Regulations [1954] 75
  amendment [1954] 70, 641; [1955] 49, 257; [1956] 133, 278, 430, 641
  application of [1955] 391
  burial, etc., regulations [1954] 560
  colonies [1956] 133
  continuance [1954] 71; [1955] 49, 50; [1956] 133; [1957] 123
  land powers [1958] 628
  petroleum [1956] 846
  revocation [1954] 70, 560, 641, 727; [1955] 49, 325
  sale of food [1955] 50
Definition of crime [1956] 792–7
Defraud, intent to [1958] 503–511
Defrauding. *See also* Fraud.
  deceit and [1954] 136
Delinquency,
  areas of [1954] 842
  causes of [1957] 217
  education and [1955] 402
  summer school [1954] 575, 841
Demanding money with menaces [1955] 500
Demerit points, driver control and [1959] 619–625
Dentists, summary justice [1957] 400
Dentists Act, 1956 [1956] 351, 432
Dentists Act, 1957 [1957] 548
Depositions [1959] 82–95, 727; [1960] 124
  dying [1956] 393–401
  failure to sign [1958] 182
Detention,
  questioning for [1959] 79
  sentences of [1959] 301, 376
Detention centres,
  Goudhurst [1954] 462, 755
  Kidlington [1954] 755; [1956] 320
  new [1956] 6, 221
  qualification for [1958] 177
  remand to [1954] 758; [1958] 245, 556
  report on [1960] 74
  visit to [1954] 755–9
  Werrington [1957] 79, 350
Devon, fisheries [1956] 66
Dictaprinter, depositions by [1955] 689–96
Diminished responsibility [1957] 349; [1958] 190, 370, 391, 393; [1959] 365; [1960] 6, 229, 424, 763
  burden of proof [1957] 711–721; [1959] 562
  mental defective [1957] 683
  Scotland, in [1957] 354–364
  Trial of Lunatics Act, 1883, and [1957] 521–529
Diplomatic Immunities Restriction Act, 1955 [1956] 135
Diplomatic immunity [1955] 230–4; [1956] 847
Discharged prisoners [1954] 238, 407; [1958] 142, 710
Diseases of Animals. *See* Animals.
Distraint on car [1956] 111
Disturbances [1957] 540, 603, 801; [1958] 326, 383, 467
Divisional court,
  affidavits [1956] 259
  case stated, form of [1954] 461
  costs in [1955] 779
  habeas corpus [1960] 263
  mandamus and case stated [1956] 319
  trivial appeals to [1955] 133
Dock regulations [1957] 55

- Documents,
  - alterations in [1954] 253
  - detection of fingerprints on [1958] 591–599
  - forgery, protection against [1960] 98
  - important, the preparation of [1959] 421–436, 673
  - scientific examination of [1954] 247–59; [1956] 175–184, 383–393
  - secondary evidence [1960] 490
  - suspect [1958] 644
- Dog Licences Act, 1959 [1959] 792
- Dogs,
  - ferocious [1959] 582
  - licence for [1957] 245, 792
  - worrying by [1954] 206
- Dr. Adams, Trial of. *See* Adams.
- Dramatic and Musical Performers Protection Act, 1958 [1958] 701
- Driver, duty of,
  - " driving along " [1959] 494
  - error of judgment [1959] 635
  - moving forward or reversing [1959] 494
  - overtaking [1959] 634
  - signals, giving [1959] 493
  - traffic lights, etc. [1959] 495
- Driver control,
  - demerit points and [1959] 619–625
- Driving licence. *See also* Road Traffic.
  - disqualification from holding [1958] 320–321, 543, 627; [1959] 311, 526
  - disqualification, special reasons against [1958] 619
  - epileptic fits, and [1958] 550, 636, 691, 695
  - obtaining by forged certificate [1958] 472
- Drugs [1955] 135, 461
  - dangerous [1954] 69, 800, 946; [1955] 511; [1956] 573; [1958] 487
  - doctor supplying [1956] 326
  - illicit [1956] 221; [1960] 633
  - summary justice [1955] 768; [1956] 43, 113; [1958] 383
  - United States, in [1956] 316–319
- Drummond murder [1955] 1, 5–12
- Drunkenness,
  - admission during [1954] 864
  - aircraft, in [1954] 205
  - car fumes and [1955] 729
  - defence, as [1955] 370–371; [1956] 146
  - definition of [1955] 522
  - effect of [1955] 183
  - evidence of [1956] 184
  - medical assistance [1955] 4
  - murder during [1954] 867
  - provocation when drunk, effect of [1954] 549
  - robbery [1954] 870
  - statistics [1954] 886; [1955] 732; [1956] 789; [1957] 427
  - summary justice [1956] 323; [1957] 603
  - tests of [1954] 443–7; [1955] 338
  - young persons [1955] 522
- Duress [1954] 448

- Editorial Board [1959] 1
- Editorial policy [1958] 1, 417
- East African appeals [1957] 182, 825
- Eavesdropping [1957] 1
- Education,
  - school attendance, [1954] 299; [1960] 363
  - school inspection [1957] 262
  - Scotland [1957] 67
  - verminous child, liability for [1954] 300
- Education (Scotland) Act, 1956 [1957] 67
- Eire and Extradition [1959] 417–420
- Elections [1959] 145
  - summary justice [1955] 564, 640
- Electricity,
  - civil defence [1954] 389
  - rights of entry [1954] 390
  - summary justice [1957] 680
- Embezzlement,
  - Davenport Case [1956] 589–607, 659–673, 730–738; [1957] 640–650, 722–726
  - definition of [1955] 734–9
  - indictment for [1954] 540
  - larceny by a servant, or (p.p.) [1957] 267
- Emergency Laws,
  - control of goods [1955] 123, 655
  - iron and steel [1955] 123, 445; [1957] 125, 694
  - paper [1956] 351, 704; [1957] 125
  - price control [1956] 279
  - raw materials [1954] 479
  - regulations [1955] 444, 511
  - strategic goods [1955] 123, 655; [1956] 430; [1957] 332, 694
  - tobacco [1954] 641
  - trade control [1956] 63
- Employment [1956] 431; [1957] 125, 603; [1959] 146, 378
- Encephalograph test [1954] 431
- Epilepsy,
  - murderers in [1954] 442
- Estoppel [1957] 389
- European Coal and Steel Community Act, 1955 [1955] 582; [1956] 64
- Evidence,
  - accessory [1956] 255; [1958] 618, 806
  - accomplice [1954] 305, 324–36; [1955] 433; [1956] 46; [1958] 471; [1959] 780; [1960] 56, 122, 124, 189
  - admissibility, presence of jury [1959] 594
  - admission made when drunk [1954] 864
  - age [1956] 256
  - alibi [1957] 52
  - arson [1956] 118
  - assault [1955] 244
  - assizes handbook [1957] 741–749; [1958] 64
  - banker's books [1955] 374, 515; [1956] 190
  - blood groups [1955] 515
  - buggery [1955] 433
  - burden of proof [1956] 289; [1958] 329; [1960] 81, 273, 453, 563, 630, 777
  - certificate of insurance [1957] 194
  - character, as to [1954] 278, 864; [1955] 215–7, 500, 567, 578, 774; [1956] 191, 241–248; [1957] 75; [1958] 254, 618; [1959] 358, 450; [1960] 420, 556
  - child, of [1954] 865
  - co-defendants [1957] 184
  - complaint [1954] 207; [1958] 387; [1960] 244
  - confession [1955] 109, 339; [1958] 806; [1959] 440, 441; [1960] 334, 341, 358
  - conspiracy, in support of [1958] 423–436
  - corroboration [1956] 121, 332, 553, 699; [1957] 246, 342; [1958] 44, 255, 256, 728–733; [1959] 122, 448, 654, 780, 841; [1960] 422, 557, 635
  - date of death [1958] 544
  - deposition,
    - dead person of [1955] 645
    - deponent ill [1959] 123, 727, 729
  - documentary [1960] 490
  - drinking, of [1960] 135, 432
  - expert witness [1955] 39
  - false pretences [1954] 208
  - finger prints [1955] 34–36; [1957] 427; [1958] 104, 347
  - footprints [1956] 655

- Evidence—*cont.*
  - foreign law [1955] 39
  - fresh evidence [1954] 62; [1960] 567
  - further [1959] 284, 286, 841
  - hearsay [1959] 121, 284
  - *Hill* v. *Baxter* and the Law of [1959] 27–38
  - hostile witness [1954] 55; [1957] 51; [1960] 832
  - identification [1956] 833
  - identification parades [1955] 525–37
  - identity, of [1954] 49; [1960] 127
  - illegal search, found by [1954] 714
  - illegally obtained [1955] 184, 328, 339–49
  - inadmissible before jury [1955] 792; [1958] 327
  - inconsistent statements [1956] 622; [1958] 133
  - incriminating statement [1959] 284
  - judges' rules [1956] 49; [1957] 552
  - letter as [1957] 112
  - letters between spouses [1955] 643
  - lottery, of [1955] 781
  - maps as, [1957] 177
  - mechanical aid [1954] 4, 73, 96–105; [1956] 442; [1957] 709; [1958] 5–14
  - medical examination [1958] 386
  - medical report [1959] 778
  - onus of proof [1957] 53, 323
  - other offences, of [1955] 413–415, 644; [1959] 445; [1960] 364
  - paternity [1955] 515
  - photograph [1955] 110, 529; [1956] (p.p.) 504; [1958] 6; [1959] 285
  - police,
    - offence by [1959] 444
    - questioning by [1959] 445
  - possession of housebreaking implements [1957] 682
  - Post Office savings book [1955] 569
  - prejudicial [1954] 871
  - previous charges, of [1954] 208, 717; [1960] 420
  - previous convictions [1957] 449–455; [1959] 358, 778
  - previous proceedings, of [1954] 143
  - previous statement [1960] 832
  - prosecution statement [1959] 360
  - quarter sessions handbook [1957] 741–749; [1958] 64
  - rape [1955] 508; [1959] 450
  - rebuttal, in [1958] 57
  - rebutting [1956] 193
  - recalling witness [1957] 804
  - receiving [1955] 570; [1960] 630
  - recording of [1955] 2
  - retraction of [1956] 329
  - Scots law,
    - admissibility of statement [1958] 753
    - precognitions [1958] 387
  - secondary [1960] 490
  - self incrimination in [1954] 916–20
  - shopbreaking [1956] 129
  - silence of accused [1959] 449, 465
  - similar modus operandi [1959] 52
  - similar facts [1956] 772; [1957] 449–455; [1960] 125
  - simultaneous translation [1958] 104
  - statements [1956] 621
    - complaint [1956] (p.p.) 850
    - defence's right to see [1955] 587
    - denied [1955] 567
    - inducement to make [1958] 188
    - interpreter, through [1954] 3, 21
    - interpreter, to [1959] 121
    - Judge's Rules. *See* Judges' Rules.
    - longhand, in [1955] 777
    - omissions from, by police [1954] 467
    - other charge, as to [1960] 364
    - person not a witness, of [1957] 805
- Evidence—*cont.*
  - statements—*cont.*
    - previous [1960] 832
    - recording machine, on [1954] 96–105; [1959] 231
    - whilst accused unconscious [1955] 566
    - written [1956] 326
  - statutory declarations [1958] 471
  - statutory instrument, of [1954] 377
  - suspect, appeal as to [1958] 42
  - tape recording [1954] 96–105; [1956] 442; [1957] 709; [1958] 8; [1959] 231; [1960] 566
  - tracker dog [1960] 634
  - traffic lights [1956] 207
  - traffic offences [1959] 715
  - transcripts of [1954] 368; [1956] 219; [1958] 13
  - victim, of, on appeal [1959] 286
  - view [1956] 260; [1957] 541
  - wife, of [1956] 192; [1960] 365
    - nullity decree, after [1954] 92–5, 135
    - offence against her property [1954] 376, 541
  - wine sample [1959] 778
  - witness, recall of [1956] 327
- Evidence Acts,
  - effect of [1959] 689
- Examining Justices,
  - Report of the Departmental Committee on Proceedings before [1958] 647–653
- Exchange control [1955] 326; [1956] 575; [1957] 131, 415, 463, 486, 550; [1960] 646, 847
- Executions [1955] 732
- Expiring Laws Continuance Act, 1953 [1954] 149
- Expiring Laws Continuance Act, 1954 [1955] 48
- Expiring Laws Continuance Act, 1955 [1956] 132
- Expiring Laws Continuance Act, 1956 [1957] 122
- Expiring Laws Continuance Act, 1958 [1959] 144
- Explosives,
  - control of [1954] 71, 642, 727; [1956] 642
  - conveyance of [1958] 265; [1960] 715
  - possession of [1957] 247
  - summary justice [1957] 463
  - unlawful possession [1959] 288; [1960] 57, 559
- Extradition,
  - amendment of law [1954] 237
  - committal to prison [1959] 524
  - Court of Appeal, jurisdiction of [1959] 53, 212
  - delay [1956] 624
  - discretion of court [1955] 110
  - documentary evidence [1955] 309
  - Eire and [1959] 417
  - foreign law, evidence of [1959] 656
  - fugitive offenders [1959] 656
  - Kenya [1957] 682
  - larceny [1957] 682
  - Malaya [1957] 260
  - political offences [1955] 75–87, 111
  - prisoner's calling of evidence [1955] 375
  - "territory," meaning of [1958] 808
  - trivial offence [1956] 50

- Factories [1954] 641
  - breach of regulations [1956] 51, 555; [1957] 53; [1960] 128
  - dangerous machinery [1959] 524
  - indiarubber regulations [1955] 797
  - painting of [1958] 487
  - summary justice [1955] 703; [1956] 113, 477

Factories—*cont.*
  thermal insulation [1957] 694
  working place [1954] 789
  young persons [1955] 258
Factory breaking [1960] 713
Fair grounds,
  betting in [1954] 737, 786
  lotteries in [1954] 737
False declarations [1954] 802
False imprisonment [1956] 261, 414, 482, 834; [1960] 835
  arraignment [1957] 539
  certificate of competence to drive, obtaining by [1958] 472
  converting thing found [1957] 250
  evidence [1954] 208
  existing fact [1957] 806
  hire-purchase agreement [1959] 727
  intent to defraud [1960] 366
  larceny and [1958] 92–99
  obtaining credit [1954] 209; [1955] 246; [1957] 395; [1958] 394
  obtaining possession [1954] 210
  statement of fact [1955] 501, 556–60
  summary justice [1957] 400, 604, 751; [1958] 541, 681
  valuable security [1956] 198
False trade description [1959] 217
Falsification of accounts,
  intent as to [1954] 136; [1958] 509
  servant, by [1954] 136; [1956] 330
Family Allowances and National Insurance Act, 1956 [1956] 640
Felony,
  arrest for, at common law [1954] 408–22
  attempted, arrest for [1954] 421
  misprision of [1954] 464; [1959] 750; [1960] 116
Fez,
  seamen deserters [1954] 153
Films Act, 1960 [1960] 783
Finance Act, 1959 [1959] 793
Fines [1954] 65; [1959] 63
  carnal knowledge [1960] 215
  default in payment of balance [1954] 129
  legal tender [1957] 427
  maximum [1956] 296
  power to impose [1958] 176
  recovery after death [1957] 469
  review of sentence [1957] 159
  time to pay [1957] 771
  use of [1954] 688
Finger prints [1955] 34–36; [1957] 427; [1958] 347, 591–599; [1960] 630
Fire,
  summary justice [1955] 768; [1956] 114
Fire service pay [1957] 129
Firearms and Offensive Weapons,
  air guns [1956] 374
  antique [1956] 588; [1957] 76
  Cyprus, in [1956] 625
  dangerous [1955] 462
  form of application [1955] 125, 197
  harpoon gun [1957] 542
  laboratory investigation [1960] 404, 478, 543, 611
  licence (p.p.) [1956] 283
  possession of,
    lawful excuse for [1954] 789
    sentence [1954] 723
    unlawful [1954] 321, 378
  shotgun [1957] 217
  summary justice [1955] 640, 704, 768; [1956] 43, 114, 187, 253, 323, 407, 477; [1957] 109 180, 240, 540, 801; [1959] 45
First Offenders Act, 1958 [1958] 629; [1959] 117, 207
Fitness to plead [1958] 144–153; [1960] 79
" Flick " knives [1959] 640–650
Food and Drugs,
  amendment [1955] 50
  bacon [1954] 560
  bread [1955] 258, 309; [1956] 262, 279, 705
  butter [1954] 479, 874
  cheese [1954] 479, 874
  citrus fruit [1958] 701
  cocktails [1958] 488
  cold storage [1954] 874
  colouring matter [1957] 627
  contamination, risk of [1957] 807
  control committees [1954] 642
  defence regulations [1955] 50
  destruction order [1956] 626
  eggs [1957] 482, 626; [1958] 557
  extraneous matter [1959] 843
  false description [1955] 40, 502; [1956] 194
  fats [1954] 479, 560
  fatstock [1955] 512
  fish [1954] 727
  fit for human consumption [1956] 101–104, 263
  flour [1956] 704
  fluorine content [1960] 141
  foreign body [1958] 46
  fruit [1954] 946
  fruit loaf [1956] 295
  hemp [1957] 627
  hygiene [1955] 463; [1956] 133, 463, 574; [1957] 125; [1958] 136; [1960] 779, 780
  ice-cream [1959] 380, 533
    sale of [1958] 184, 749–751
  labelling [1956] 133, 415
  licensing [1954] 224
  markets, transfer of functions [1954] 313
  marking [1958] 59
  meat, deficiency of weight [1954] 468
    meaning of [1956] 556
    prices [1954] 561, 643
    rationing [1954] 313, 560, 643
    sterilising [1959] 222, 380; [1960] 715
  milk [1954] 469, 874, 877, 946; [1955] 325, 394, 719; [1956] 63, 351, 574, 777; [1957] 125, 200, 332, 402, 412; [1958] 335, 488, 762; [1959] 224, 379, 479, 599; [1960] 442
  mineral oil [1954] 800; [1956] 133
  misleading advertisement [1955] 503, 658
  newly cooked food [1956] 372
  oils [1954] 560
  packing [1956] 704
  powers of entry [1954] 149
  prepacked foods [1958] 59
  preservatives [1959] 146
  prosecution of offences [1956] 557
  public analysts [1957] 332
  quality demanded [1956] 195, 415; [1958] 46, 47
  rationing [1954] 224, 479, 560, 643, 727
  retailer, liability of [1959] 843
  sale above maximum price [1954] 211
  sampling officer, sale to [1960] 369
  sausages [1954] 543; [1955] 778; [1956] 195; [1958] 326
  Scotland [1959] 602
  ships' stores [1954] 224, 560, 643, 727
  slaughterhouses [1954] 642; [1959] 146; [1960] 779
  snails [1959] 451
  soft drinks [1954] 800
  standards [1954] 560; [1955] 512; [1956] 133, 642
  substance and quality, not of [1955] 707

Food and Drugs—*cont.*
  summary justice [1955] 769; [1956] 114, 324, 408, 477, 545, 696; [1957] 109, 180, 240, 318, 400, 540
  transfer of functions [1955] 391, 580
  unauthorised possession of [1960] 633
  unfit for consumption [1954] 212; [1955] 779; [1956] 559
  weights and measures [1956] 704; [1958] 59
  welfare foods [1954] 947; [1955] 719; [1956] 135; [1957] 332
Food and Drugs Act, 1955 [1956] 63; [1959] 451
Food and Drugs Amendment Act, 1954 [1955] 50
Food and Drugs (Scotland) Act, 1956 [1956] 357, 575
Football coupons,
  forgery of [1954] 379
Football pools [1954] 637, 737
Footprints [1956] 655
Foreign countries, crime in [1956] 293
Foreign law, evidence of [1959] 656
Forensic Ballistics, Some Notes on [1959] 339–349
Forensic science,
  adviser in [1958] 1
  anonymous letters [1954] 341–53
  ball-point pen [1955] 544–51
  blood and [1960] 700
  British Academy of [1959] 683; [1960] 585
  chemical tests [1954] 108
  documents, examination of [1954] 247–259; [1956] 175–184, 383–393
  firearms cases [1960] 404, 478, 543, 611
  forged signatures [1955] 748–55
  forgery by typewriter [1955] 407–413; [1956] 18–21
  hair, identification of [1954] 906–14
  handwriting, examination of [1954] 511–17
  inks, examination of [1954] 250
  insulin, use of [1958] 71
  introduction [1954] 107–14
  laboratories [1954] 110–114; [1956] 587, 723
    North-Eastern [1954] 239
  motoring offences [1955] 282–9
  murder without a body [1955] 158–69
  paper, examination of [1954] 258
  pencil writing, examination of [1954] 255
  scenes of crime [1956] 524–529
  society [1959] 547, 806
  textile fibres [1954] 836–40
  toxicology [1954] 107–10
  typewriting [1954] 598–603
  writing ink [1957] 145–155
Forfeiture under the Customs laws [1958] 786–792
Forgery,
  account book, entries in [1957] 808
  certificate of competence to drive [1958] 474
  financial loss [1960] 129, 423
  football coupons [1954] 379
  intent to defraud [1960] 190, 423
  lack of evidence [1955] 646
  motor vehicle log book [1954] 604–10
  "Mr. One-by-One" [1954] 125
  protection against [1960] 98
  recording machine [1954] 96
  sentence for [1956] 60
  signatures, of [1955] 748–55
  trade mark [1956] 196
  typewriter, by [1955] 407–13
  typewritten document [1956] 18–21
Forgery—*cont.*
  uttering [1956] 829; [1960] 190, 423
  wife's evidence against husband [1954] 92–5, 135
Fortune telling [1955] 255; [1959] 4
Foster children,
  provisions relating to [1958] 698
France,
  consular convention [1954] 157
  methods in [1956] 657
  seamen deserters [1954] 153
Fraud,
  company, on [1955] 40
  conspiracy and [1959] 839
  income tax [1956] 290, 333
  medium [1955] 255
  post office [1954] 489
  postmistress, by [1955] 18–26, 133
  prevention of [1954] 739; [1956] 197–204; [1958] 809
  reckless statements [1958] 809
  Revenue [1954] 354–359; [1956] 290, 333
  summary justice [1957] 180, 400, 540
  wagering, in [1959] 289
Fraudulent conversion [1956] 122, 835; [1958] 49, 545, 812; [1959] 54; [1960] 759
Fraudulent trading [1959] 779
French law,
  car parking [1955] 666
  Drummond murders [1955] 1, 5
  preliminary inquiry [1955] 1, 5, 276
  procedure [1955] 272–82
  tax evasion [1955] 666
Friendly Societies,
  misappropriation from [1954] 213, 644
  returns of [1954] 644
Fry, Margery, Memorial Fund [1958] 418
Fuel rationing [1957] 64, 125, 331, 412
Function of the criminal law, the [1958] 497

Gambling,
  disuse warehouse, in [1956] (p.p.) 285
  police discretion as to [1954] 271–3
Game [1955] 45; [1957] 268; [1959] 168
Gaming [1955] 704; [1956] 639
  bubble-gum machine [1960] 58
  chemin de fer [1958] 546
  common gaming house [1958] 685
  defence [1959] 533
  licensed premises, on [1958] 389, 812
  pin table (p.p.) [1957] 420
  R. *v.* Aspinall and [1959] 163–171
  summary justice [1956] 114, 187; [1958] 184, 384
Gang warfare [1956] 511
Gangsters [1957] 426
Gas,
  civil defence [1954] 389
  larceny of [1958] (p.p.) 634
  meter, theft of [1958] 70, 276, 346
  poisoning [1958] 70, 276, 346
  rights of entry [1954] 390
German Conventions Act, 1955 [1955] 581
  summary justice [1956] 324
Germany,
  juvenile courts in [1956] 401–405
Ghana [1957] 260
  appeal from [1957] 692
Glossary [1954] 239, 574, 733
Greece,
  seamen deserters [1954] 315
Grievous bodily harm,
  direction to jury [1955] 570; [1957] 325
  fright, as a result of [1957] 351
  insanity [1956] 560
  intent [1960] 491, 492

Grievous bodily harm—*cont.*
  private prosecution [1954] 39–41
  unlawful chastisement [1958] 690
  wounding with intent [1956] 122
Gross indecency,
  attempt [1954] 137
  invitation [1954] 137
  procuring act of [1959] 448
  sentence for [1954] 553
Guilty, pleading, by letter [1959] 605

Habeas Corpus,
  appeal [1959] 584, 720
  applicant at liberty [1957] 249
  Australian House of Representatives [1955] 570
  British protectorate, within [1960] 59
  certified institution, from [1957] 403
  Chancery Division [1959] 361
  child in need of care and protection [1956] 617
  costs of application [1954] 621
  Divisional Court [1959] 125
  extradition [1955] 75–87; [1956] 50, 624
  fugitive offenders [1959] 844
  jurisdiction [1959] 657; [1960] 59
  Mental Deficiency Act, 1913 [1958] 258
  mistaken identity [1960] 835
  notice of previous convictions [1960] 61
  person " found neglected " [1956] 331
  person serving lawful sentence [1954] 544; [1960] 369
  postponement of proceedings [1959] 362
  protectorate [1959] 657
  reform [1960] 295
  release from special school [1957] 114
  Scotland, in [1960] 254
  sentence unaltered, where [1958] 687
Hackney carriage, fares [1957] 809
Hair, identification of [1954] 906–14
Handwriting,
  disguise [1954] 514
  master patterns [1954] 512
  scientific investigation of [1954] 511–17
Hawkers [1956] 416
Heroin [1955] 337, 514; [1956] 150
Highways,
  dangerous driving of bicycle [1954] 137
  drunkenness, on [1956] 483
  hindering free passage [1957] 818
  lime dust on [1955] 707
  mud on [1954] 159, 213
  obstruction of [1955] 335; [1956] 374, 561
  parking [1960] 593
  pavement artist [1956] 265
  stopping-up [1954] 728; [1955] 52
  summary justice [1956] 253, 324, 408, 545, 825; [1957] 45; [1958] 467
  water on [1958] 467
Highways Act, 1959 [1959] 794
Highway law,
  consolidation of [1959] 160, 794
Hill v. *Baxter*,
  Law of Evidence and [1959] 27–38
Hire-Purchase,
  absolute liability [1957] 810; [1958] 390
  advertisement [1957] 695
  control of [1954] 728; [1955] 257, 258, 581; [1956] 279, 351, 432, 705, 846; [1957] 65, 126, 333; [1960] 499
  larceny as bailee [1957] 470
  limited option to purchase [1954] 380
  money lent [1957] 114
  obtaining by false pretences [1959] 727, 741
  obtaining credit by fraud [1955] 246
  relaxation of regulations [1958] 762
  revocation of controls [1958] 826
Hire-Purchase Act, 1954 [1954] 801
Home Office,
  Circulars,
    63/54...[1954] 291
    64/54...[1954] 291
    66/54...[1954] 292
    74/54...[1954] 370
    76/54...[1954] 462
    79/54...[1954] 462
    143/54...[1954] 577
    19/55...[1955] 176
    68/55...[1955] 372
    100/55...[1955] 563
    132/55...[1955] 639
    151/55...[1955] 701
    18/56...[1956] 250
    37/56...[1956] 320
    40/56...[1956] 406
    128/56...[1956] 824
    4/57...[1957] 108
    10/57...[1957] 179
    107/57...[1957] 460
    151/57...[1957] 671
  inspection of police [1959] 235
  questions to [1956] 5
  research by [1957] 350
Homicide,
  abortion [1960] 760
  accomplice [1959] 780
  capital [1959] 780, 782, 784, 845; [1960] 11
  causation [1957] 429–440, 510–521, 576–585, 702, 760; [1959] 441, 453
  " course or furtherance of theft " [1959] 291
  death, alleged date of, in [1958] 547
  diminished responsibility [1958] 190, 370, 391, 393; [1959] 845; [1960] 6, 229, 424, 723
  drunkenness [1960] 770
  fitness to plead [1959] 847; [1960] 79
  insanity [1960] 424
  jury, direction to [1960] 491
  malice aforethought [1958] 714–721; [1960] 491, 732, 738, 765
  malice implied and constructive [1958] 15–30; [1960] 5
  medico legal autopsy [1957] 15–27
  mistake [1955] 708
  non-capital [1959] 366
  police officer, of [1959] 784
  provocation [1959] 584, 697–704; [1960] 10, 770, 839
    self-defence, and [1959] 366, 453, 786
  reasonable man and [1960] 737, 765
  rebutting plea of insanity [1959] 365
  repeated murders [1960] 13
  self-defence [1954] 621; [1958] 583–590; [1960] 468, 770
  sentence [1960] 839..
  summing up [1960] 211, 425
  theft, after [1959] 782
  unlawful act [1960] 760
Homicide Act, 1957...[1957] 141, 282–292; [1959] 681; [1960] 5–13
  malice implied and constructive [1958] 15–30
  Scotland, in [1957] 500
Homosexual case, a [1959] 411–416
Homosexual offences [1954] 4
  Australia, in [1954] 124
  debate [1954] 405; [1960] 518
  law and [1956] 22–25, 286
  prison treatment [1954] 323
  Royal Commission [1954] 405, 575, 738; [1955] 338
    report of [1957] 637, 665–668
Horror comics [1954] 886; [1955] 62, 461
Horse Breeding Act, 1958 [1958] 697
Horses [1955] 47; [1958] 697

House of Commons Disqualification Act, 1957...[1957] 414
House of Lords, appeal to [1956] 628; [1957] 58, 135, 559, 566–576; [1958] 501
Houseboat twins case [1957] 80–95
Housebreaking,
  constructive [1954] 790
  offices and shop [1957] 57
  possession of implements [1955] 648
Housing [1954] 801; [1955] 48; [1956] 132
  summary justice [1955] 640; [1956] 616
Housing Repairs and Rents Act, 1954 [1954] 801
Howard League [1956] 724; [1957] 707; [1958] 712; [1959] 547, 748
Hunting [1957] 281
Husband and wife,
  coercion and [1954] 449
  conspiracy [1957] 185
  evidence of [1954] 92–95, 135, 376, 541; [1956] 192
  joint trial [1954] 141
  larceny of wife's property [1955] 186
  letters between [1955] 643

Ice-cream [1958] 749–751
Identification,
  parades [1955] 525–537; [1956] 219, (p.p.) 359; [1957] 5, 280; [1958] 44, 142
  police dog by [1954] 49
Impersonation [1957] 400, 801
Import control [1957] 265
Imprisonment. *See* Sentence.
Incest [1956] 329
Income tax,
  frauds [1954] 354–359; [1956] 290, 333
Incorrigible rogue [1959] (p.p.) 69
Indecency, attempt [1957] 54
  children, with [1959] 682
Indecency with Children Act, 1960 [1960] 520, 643
Indecent assault,
  complaint [1954] 207
  corroboration [1956] 332, 699; [1959] 122, 654
  maximum sentence [1954] 381, 944
  meaning of [1956] 529–34
  mental defective, on [1957] 249
  motive [1956] 52, 532–3
  obscene photograph [1959] 285
  persons under sixteen [1956] 446–56, 529–42; [1958] 481
  similar facts [1956] 772
  what constitutes [1958] 127
  women, by [1956] 446–56, 529–42
Indecent exposure [1954] 933; [1956] 496; [1957] 246
Indemnity [1955] 377
Indiarubber regulations [1955] 797
Indictment,
  accused's right to copy of [1955] 270
  affray, in [1959] 293
  amendment [1954] 934
  based on inadmissible evidence [1956] 53
  conspiracy [1956] 560, 829; [1957] 244; [1960] 358
  corruption, particulars of [1960] 773
  drafting and inspection [1957] 41, 70
  duplicity [1955] 192; [1960] 554, 569
  embezzlement [1954] 540
  false pretences and fraud [1958] 394
  founded on disclosure from compulsory process of law [1955] 504
  joinder of accused [1958] 247, 539
  joint [1956] 345
Indictment—*cont.*
  larceny [1954] 475; [1956] 200
    charge of [1955] 696–9
    conspiracy and [1955] 775
    husband's [1955] 186
    pig, of [1954] 695–7
  manslaughter and dangerous driving [1957] 116
  misjoinder [1960] 267
  motion to quash the [1958] 422
  murder, two charges of, in [1958] 475
  omission in [1960] 57, 559
  plea to [1954] 790
  preferment, private [1954] 39
  quashing [1955] 371, 496
  receiving [1954] 475; [1956] 489; [1957] 685
  rules [1957] 414
  Scots law [1960] 201
  settling, time for [1960] 357
Industrial and Provident Societies (Amendment) Act, 1954 [1954] 644
Infanticide,
  presentment [1954] 764
Infants,
  imprisonment [1955] 111, 311, 521
Information,
  laying an [1958] 419
  multiple charges [1956] 418
Ingleby Committee [1960] 791
Ink,
  scientific investigation of [1954] 250
Inland Revenue,
  frauds at common law [1954] 354–9
Inquisition, committal on [1960] 44
Insanity,
  burden of proof [1954] 675; [1960] 453
  criminal responsibility and punishment [1954] 661–86
  diminished responsibility. *See* Diminished responsibility.
  direction to jury [1956] 335
  disease of the mind [1956] 774
  evidence of [1957] 115
  evidence to rebut plea of [1959] 365
  feeble-minded person [1954] 216
  fitness to plead [1956] 615
  intermittent [1956] 560
  jury discretion [1954] 436
  mental deficiency [1954] 509, 720
  morality and [1954] 276
  prerogative of mercy [1954] 664
    recommendation as to [1954] 657
  proof of [1959] 559
  psychopath and [1954] 22–9, 144
  refusal to plead [1956] 633
  sentence [1954] 676
  trial, diminished responsibility and [1957] 521–529
  trial of issue [1954] 20
  verdict [1954] 676
Institute of Criminology [1958] 568; [1959] 80
Insurance [1958] (p.p.) 705; [1959] (p.p.) 151
Insurance Companies Act, 1958 [1958] 701
International Law [1955] 581, 655; [1956] 64, 280, 847
Intoxicating liquors,
  agent's sale out of hours [1954] 545
  airports [1956] 499
  club [1955] 246 (p.p.) [1957] 759
  licensing, Metropolis [1954] 875
  meal, meaning of [1955] 248
  music on premises 1954] 935; [1957] (p.p.) 339, 613
  obstruction of police [1955] 189
  private friends (p.p.) [1957] 67.
  seamen's canteens [1954] 313
  staff, drinks to [1955] 780

- Intoxicating liquors—*cont.*
  - summary justice [1956] 114; [1957] 319, 400
  - young persons, for [1955] 204; [1956] 643, (p.p.) 852
- Intoxication. *See also* Drunkenness.
  - blood tests [1954] 444
  - tests of [1954] 443–7
  - urine tests [1954] 445
- Involuntary Conduct, Automatism and [1958] 361–367, 440–452
- Ireland,
  - return of offenders to [1958] 614
- Irvine pilotage [1954] 729
- Israel,
  - larceny from shop [1955] 475–8
- Italy,
  - Montesi Case [1955] 359–64

- Judge,
  - functions of [1954] 661–86
  - jury and, balance of control [1954] 663
  - tenure of colonial [1955] 395, 586, 721
- Judges' Rules [1954] 56; [1959] 765; [1960] 306, 316
- Judicial appointments [1954] 78, 161, 239, 492, 577, 660, 739, 816, 888; [1955] 4, 65, 135, 204, 338, 524, 667, 733; [1956] 6, 77, 221, 588, 724, 791; [1957] 5, 79, 144, 217, 281, 501, 710, 772; [1958] 4, 72, 142, 208, 278, 347, 502, 713; [1959] 232, 312, 483, 547, 684, 809; [1960] 4, 78, 151, 231, 297, 384, 451, 520
- Judicial Offices (Salaries and Pensions) Act, 1957...[1957] 695
- Juries Act, 1954 [1954] 644
- Jurisdiction,
  - blackmail [1957] 238
  - British aircraft [1956] 417
  - offence abroad [1956] 829
  - time limit [1958] 50
- Jury,
  - allowances [1955] 124; [1958] 826; [1960] 280
  - constructive murder, cases of [1954] 435
  - convicted man and [1957] 36–38
  - direction to,
    - burden of proof [1955] 323, 464–74
    - capital murder, in [1958] 688
    - corroboration on [1960] 557
    - driving when drunk [1954] 940
    - evidence of accomplice, as to [1954] 326
    - larceny [1954] 475
    - manslaughter [1954] 60
    - murder [1954] 60, 216, 865, 866
    - reasonable doubt [1957] 76, 170–177
    - receiving [1954] 475
    - self-defence [1957] 328
  - disagreement [1954] 139
  - discharge of [1960] 435
  - discretion [1954] 437
  - exclusion from court [1955] 792
  - exemption from [1956] (p.p.) 504; [1957] 36–38
  - fixture of [1954] 438
  - functions of [1954] 661–86
  - insanity cases [1954] 436, 661–86
  - judge and, balance of control [1954] 663
  - list [1954] 561
  - majority verdict [1954] 500
  - member of [1955] 4
  - murder trials, at [1954] 76, 661
  - need for [1956] 457–460
  - number of [1954] 660, 885
- Jury—*cont.*
  - oath [1957] 3, 143, 178
  - payments to [1954] 577, 644
  - previous convictions and [1957] 118, 822
  - provocation cases [1954] 435
  - separation of [1954] 51
  - summing up to [1960] 211
  - talesmen, of [1958] 51
  - threat to [1960] 210, 491, 492
  - trial by [1958] 418
  - trusting the [1954] 434–9
  - verdict of [1955] 44, 270, 709; [1956] 54
    - conspiracy, disagreement [1957] 687
    - on alternative count [1956] (pp.) 780
    - recommendation to mercy [1957] 688
  - withdrawing case from [1958] (p.p.) 560
- Justices. *See* Magistrates.
- Juvenile courts,
  - constitution [1955] 124, 451, 701
  - Germany, in [1956] 401–405
  - London [1955] 512; [1956] 499, 643; [1958] 336, 827
  - procedure [1955] 176
  - welfare council and [1954] 338
  - women magistrates [1954] 74, 370
- Juvenile,
  - delinquency [1955] 593; [1956] 4; [1957] 215
  - institutions for [1954] 339
  - Liverpool liaison officers [1956] 442
  - prevention of crime of [1955] 173–5
  - witnesses [1956] 250

- Kaleidoscope [1958] 793–798
- Kenya,
  - evidence of local law [1959] 658
- Knives, " flick " [1959] 612, 640–650
- Knowledge, ignorance and animus turandi [1959] 613–618

- Labour Laws,
  - baking industry [1954] 802
  - catering industry [1954] 301
  - wages [1954] 301, 302
- Lancashire,
  - criminal courts for [1954] 658; [1956] 585
- Land Powers (Defence) Act, 1958 [1958 628
- Landlord and Tenant,
  - excess rent, charge of [1954] 303
- Landlord and Tenant (Furniture and Fittings) Act, 1959 [1959] 795
- Landlord and Tenant (Temporary Provisions) Act, 1958 [1958] 701
- Larceny,
  - accomplices' evidence [1954] 622
  - alibi [1954] 382
  - army hut, of [1955] 404–7
  - attempt [1954] 139
  - bailee, as [1957] 470; [1958] 128; [1960 494
  - burglary. *See* Burglary.
  - cheques, and [1958] 525–528
  - claim of right [1956] 199
  - compensation [1956] 294, (p.p.) 358
  - delivery by owner [1958] 93
  - drinks after hours [1960] 132
  - embezzlement by servant [1954] 383
  - evidence of [1954] 304
  - false pretences or [1960] (p.p.) 444
  - farm gate [1956] 266
  - finding by [1954] 140; [1957] 250; [1960 426, (p.p.) 852
  - finding out, by [1956] 516–524, 580
  - fraudulent intent [1956] 78–89, 238–241 360

Larceny—*cont.*
  hire car [1956] (p.p.) 282
  hire-purchase agreement [1956] 198; [1959] 727
  identification in [1958] 530
  indictment [1954] 475; [1956] 200
  intention [1955] 312, 794, 795; [1957] 607; [1959] 613; [1960] 435
  misappropriation of change [1960] 193
  mistake as to quality [1958] 221–232, 307–313
  mistake, by [1956] 258, 516–524, 580
  movable hut [1954] 58
  murder whilst committing [1954] 624
  owner's description [1956] 267
  pedestrian crossing globes [1956] (p.p.) 579
  petrol [1957] 118
  pig, of [1954] 695–7
  police district of theft [1956] (p.p.) 436
  police search [1957] 217
  possession in [1958] 534
  principals [1957] 488
  property in goods taken [1955] 781
  receiving and [1956] 46
  recent possession [1954] 304
  reform of law [1957] 707
  refuse [1957] 186
  restitution of property [1956] 270; [1957] 189, 305–316, 377–388, 553, 761
  rival gangs [1957] 564
  robbery. *See* Robbery.
  Scots law [1959] 454, 465
  servant, by [1956] 418, 589–607, 659–673; [1957] 638, 640–650, 722–726
  shop, meaning of [1955] 475–8
  shop, outside [1960] 426
  slot machines, from [1956] 74
  soldier, by [1955] 505, 696–699; [1957] 489
  stolen property, restitution of [1954] 127
  summary justice [1955] 640, 769; [1956] 44, 114, 187, 253, 324, 408, 546, 769, 825; [1957] 109, 180, 241, 319, 401, 604, 681; [1958] 681, 752
  taking, possession [1957] 610
  trick, by a [1955] 571; [1958] 92; [1959] 729
  trick, by, and contract [1957] 28–36, 96–104
  twice on same premises [1957] 638
  wage retention and [1954] 886
  workmates' pay packets [1956] (p.p.) 435
Law Reform (Limitation of Actions, etc.) Act, 1954 [1954] 644
Law Reports,
  Scottish criminal [1958] 368–370
Lawyer, ethics of [1957] 796
Leeward Islands Act, 1956 [1956] 348
Legal aid [1955] 522; [1960] 280
  false statement [1955] 710
Legal Penalties,
  Revaluation, the Need for [1959] 393–410
Legal system, British [1959] 745
Legal tender [1957] 427
Legitimacy [1960] (p.p.) 784
Lesbianism [1958] 372
Letters to the Editor [1954] 227, 315, 396. 482, 647, 731; [1955] 55, 130, 197, 261, 328, 395, 451, 514. 586; [1957] 70, 135, 206, 270, 342, 490, 553, 702, 760; [1958] 64, 135, 199, 412, 493, 562, 636. 695, 767; [1959] 71, 153, 225, 305. 386. 539. 605, 671, 741, 871; [1960] 224, 446, 505, 582, 785, 855
Libel, obscene [1954] 593–7
  privileged occasion [1954] 716
Licence,
  private carrier's [1958] 693
  refusal of [1958] 684
  release on [1954] 459–60
  summary justice [1958] 326
Licensing,
  adequacy of notices [1958] 539
  licensed premises [1960] 181
  liquor [1958] 702
  police entry [1960] (p.p.) 145
  registered clubs [1960] 183
  Scots law [1960] 268
Licensing (Airports) Act, 1956 [1956] 499
Licensing Laws,
  market day exemption [1959] 455
  standard of proof [1959] 454
Licensing (Scotland) Act, 1959 [1959] 799
Licensing (Seamen's Canteens) Act, 1954 [1954] 313
Lighting,
  Road Transport [1958] 218–221
Limitation of Actions [1954] 644
Litter [1956] 586; [1960] 561
  Act, 1958 [1958] 628
  prohibition of [1958] 628
  summary justice [1959] 119
Liverpool Crown Courts [1956] 354, 585
Liverpool, prevention of juvenile crime [1955] 173–5
Local authorities,
  by-laws [1955] 641, 704, 769; [1957] 319
  care of children [1957] (p.p.) 133, 322
  elector, obstruction of [1956] 75
  members' disqualification [1955] 377, 571, 648, 650; [1956] 34–38, 123, 201, 271, 419; (p.p.) [1957] 266
  parking fees (p.p.) [1957] 341
  prosecutions by [1954] 929–32; [1955] 55, 255
  prosecutions under recent Acts [1957] 226–228
  summary justice [1956] 44, 115, 187, 253, 546, 696, 770; [1957] 180
London,
  barbers [1954] 948
  building line [1954] 304
  Buildings Acts [1955] 947
  cabs [1957] 413, 754; [1959] 146
  City of [1954] 947
    smoke abatement [1954] 947
  hooliganism [1955] 203
  insulting behaviour [1958] 702
  juvenile courts [1955] 512; [1956] 499, 643
  magistrates' jurisdiction [1955] 114
  pedestrian crossings [1954] 394
  P. L. A. road [1955] 321
  quarter sessions [1954] 323; [1956] 847
  search and arrest in [1960] 598
  Sessions House [1955] 134
  street defacement [1954] 948
  street trading [1956] 562; [1957] 252
  traffic [1954] 149, 150, 224, 225, 313, 391, 479, 561, 645, 728, 729, 803, 875, 948; [1955] 52, 195, 259, 326, 391, 445, 512, 582, 656, 719, 797; [1956] 64, 135, 212, 280, 351, 432, 500, 575, 643, 706, 848; [1957] 65, 126, 201, 263, 333, 483, 696, 755, 825; [1958] 60, 61, 137, 196, 266, 336, 408, 409, 488, 557, 629, 702, 763, 827; [1959] 66, 147, 222, 303, 381, 472. 533, 599, 666, 738, 795, 869; [1960] 66, 141, 218, 280, 376, 443, 500, 574, 594, 645, 716, 781, 851
  witnesses [1957] 334
London County Council (General Powers) Act, 1954 [1954] 947

London County Council (General Powers) Act, 1957 [1957] 825
London Sessions,
  appointments [1959] 80
Lord Chief Justice, The [1958] 641
  criticisms by [1959] 681
Lottery,
  bubble-gum machine as [1960] 58
  competition [1954] 545
  dance [1954] 59
  fair ground, in [1954] 737
  lawful [1959] 533
  legislation as to [1954] 322, 737
  licensee and [1956] (p.p.) 850; [1958] (p.p.) 138
  " one distribution of prizes " (p.p.) [1957] 203
  police discretion as to [1954] 271–3, 396
  private [1955] 113, 463
  private club, in [1954] 791
  promotion of 781
  running a [1957] 586–600, 651–658
  small [1956] 639
  tickets [1956] 443, 836
Lunatics,
  law relating to [1959] 796
  trial of, diminished responsibility and [1957] 521–529

McNaghten Rules. *See also* Insanity.
  amendment of [1954] 684
  analysis of [1954] 677
  responsibility, answering question of [1954] 682
  wrong, meaning of [1954] 680
Machinery, dangerous [1959] 524
Magisterial chaos [1958] 645
Magistrates and Magistrates' Courts,
  adjournment in [1954] 475
  administrative order [1956] 626
  advice, Lord Chancellor's [1960] 296
  allowances [1954] 875; [1957] 263; [1960] 281
  appeal from [1955] 306, 396, 453, 788; [1956] 204, 205, 249, 644; [1957] 184
  attendance centres [1959] 147
  bail [1955] 639; [1956] 693
  binding over [1955] 484–9, 711
  case stated [1955] 249; [1958] 112
    clerks [1955] 401
    form of [1955] 572
    out of time [1958] 751
  clerk,
    advocacy by [1956] 169–174
    bias [1954] 792
    compensation to [1954] 875
    consultation with [1954] 44, 140; [1956] 125; [1960] 450
    interference by [1954] 623
    pensions [1954] 804; [1955] 720
  colonial [1955] 99–105, 148–53, 234–8, 261
  committal for trial from [1954] 291; [1955] 478–483; [1956] 249, 823; [1957] 819; [1959] 77, 82–95
  committal in camera [1960] 518
  committal to quarter sessions [1954] 866
  committees [1954] 576; [1960] 656
  congestion in [1959] 77
  constitution of [1954] 718
  consultation with clerk [1954] 44, 140
  contempt in [1954] 575
  costs on appeal to quarter sessions [1954] 618
  damaging car [1956] 542
  decision, alteration of [1954] 547, 936
  defendant's absence from trial (p.p.) [1957] 758

Magistrates and Magistrates' Courts—*cont.*
  depositions of dead person [1955] 645
  detention centre [1954] 462; [1956] 320
  detention for one day [1957] 398
  dictaprinter, by [1955] 689–96
  discretion [1956] 511
  disqualification from driving [1958] 547
  distraint on car [1956] 111
  domestic proceedings [1959] 147
  driving offences [1954] 537
  dying depositions [1956] 393–401
  error in record [1959] 367
  examining,
    adding charges [1957] 301–304
    sitting at quarter sessions [1954] 43, 66
  excessive fines [1956] 202
  extradition proceedings [1955] 79, 86, 375
  fees [1957] 121
  first offenders, imprisonment of [1958] 629
  imprisonment, wrongful [1956] 563; [1957] 59
  imputations on [1956] 39
  incapacity of p.c. conducting case [1956] (p.p.) 359, (p.p.) 509
  joint accused [1960] 495
  judgment debtor, warrant against [1957] 238
  jurisdiction [1955] 314; [1957] 263; [1960] 561, 562
  jurisdiction to correct record [1954] 214
  justices' clerks' superannuation [1959] 667
  juvenile courts [1954] 74, 370
  limitation of action [1956] 482
  maintenance orders [1957] 179; [1959] 147, 223
  mandamus against [1960] 496
  mental deficient, committal of [1957] 403
  metropolitan [1954] 237, 490; [1955] 114, 337; [1959] 796
  minor offences, trial of [1954] 292, 709, 814; [1955] 538–44
  Mr. Sutterthwick's Court [1955] 416–20, 614–625; [1956] 26–34, 231–238, 460–466; [1957] 229–237, 440–449, 659–665; [1958] 84, 298, 512, 722; [1959] 172–182, 411–416, 626–633; [1960] 34, 461, 621
  multiple charges [1957] (p.p.) 827
  notice of adjourned hearing [1956] 334
  notice of charges [1954] 405, 492
  notification of decisions [1955] 243, 395
  oaths [1955] 700
  penal order on costs [1954] 215
  petty sessional divisions [1954] 150, 314, 391, 480; [1955] 53, 62, 125, 326, 512, 719; [1956] 136, 351; [1957] 201, 413, 483; [1958] 137, 488, 702; [1959] 382, 601; [1960] 143. *See also* Petty sessional divisions.
  plea, change of [1955] 636
  pleading guilty by letter [1959] 605, 852
  Police (Property) Act, procedure [1957] 461
  preliminary hearings [1957] 216, 277, 499
  privileged communications of [1955] 313
  probation committees [1954] 875
  procedure [1959] 213, 214
  process, signature by one [1954] 371
  recognisance, forfeiture of, as a charge [1954] 782
  recognisances [1956] (p.p.) 284
  rules, amendment of [1960] 781

Magistrates and Magistrates' Courts—*cont.*
  Scotland, in [1955] 94
  secret examinations [1957] 216, 277
  sittings of [1955] 270
  submission of no case [1956] 714, 783; [1956] 804–7
  submission, reading [1959] 213, 214
  summary order, disobedience of [1954] 862
  summary trial, withdrawal of consent to [1957] 601, 625
  summons, jurisdiction to issue [1956] (p.p.) 711
  Thames police office [1956] 90–100, 680–87, 807–14
  trial, [1956] 145
    election for [1954] 547
    in accused's absence [1954] 475
  venue [1955] 314
  view by [1958] 63
  warrants [1958] 247–250
  warrants of arrest after adjournment [1954] 537
  West Riding accounts, 1829–1830... [1957] 529–536
  witnesses at [1954] 73, 161, 227, 292, 316, 483, 814
    binding over [1956] 475
    justices' powers [1956] (p.p.) 578
    recall of [1954] 549
    warrants, execution of [1955] 561
Magistrates' Association [1955] 32–3, 764–6; [1956] 821–2; [1957] 796; [1958] 798–801
Magistrates' Courts Act, 1957...[1957] 547, 671–680
Magistrates' Courts (Appeals from Binding Over Orders) Act, 1956 [1956] 644
Mail bag,
  robbery, sentence for [1954] 386
Maintenance [1955] 41, 249
  official records [1957] 499
Maintenance orders,
  Act, 1958 [1958] 630; [1959] 223
  attachment in pursuance of [1958] 630
Malice,
  aforethought [1958] 714–721
  constructive [1954] 166
Malicious damage [1955] 573, 703; [1956] 542; [1959] (p.p.) 385, (p.p.) 800; [1960] 654, 667
  summary justice [1956] 186, 545, 615, 769; [1957] 318, 751; [1958] 752
Malicious prosecution [1955] 184; [1956] 271; [1959] 56; [1960] 428
Malicious wounding,
  provocation [1959] 126
Malpractices by the police [1958] 565–568
Manchester Crown Court [1956] 354
Mancini trial [1956] 373
Mandamus [1956] 319; [1957] 58; [1958] 112, 474; [1960] 496
Manoeuvres Act, 1958...[1959] 143
Manslaughter,
  abortion [1958] 475
  assault, by [1954] 936
  burden of proof [1955] 506
  causation [1957] 429–440, 510–521
  constructive [1954] 671; [1957] 293–301
  corrective training [1954] 630
  direction to jury [1954] 60
  drunkenness [1954] 867
  indictment [1957] 116
    other counts in [1958] 615
  joinder of counts [1958] 125
  miscarriage, using instrument to procure [1958] 469
  neglect of child [1959] 785
Manslaughter—*cont.*
  summing-up, defective [1959] 850
  thief, of [1958] 520
  unlawful chastisement, as [1958] 690
Manuel, The Trial of [1958] 654–661
Markets,
  transfer of functions [1954] 313
Marriage,
  Acts Amendment Act, 1958 [1958] 630
  consent to [1956] 420
  decree absolute of nullity, before [1958] 617
  false declaration for [1958] 251
  places of worship, registration of [1958] 630
Master and servant,
  summary justice [1956] 187, 253, 324; [1957] 319
Matrimonial Causes [1959] 223, 382
Means inquiry warrant [1954] 128
Meat. *See* Food and Drugs.
Medical Act, 1956...[1957] 65
Medical Act, 1956 (Amendment) Act, 1958 [1958] 702
Medical examination.
  influence of drink [1958] 371
Medicine [1955] 53
  dentists [1956] 351, 432; [1957] 696
  General Optical Council [1959] 66
  opticians, registration of [1958] 631
  Pharmaceutical Society [1957] 483
  summary justice [1955] 563, 641; [1956] 825; [1957] 751
  therapeutic substances [1955] 125; [1956] 353, 644; [1957] 413, 483; [1958] 266; [1959] 534
  Uganda [1958] 61
Medico-legal autopsy [1957] 15–27
Mens rea,
  administering noxious thing [1957] 326
  children [1954] 493–500
  constructive malice [1954] 666
  contempt [1956] 831
  death by dangerous driving [1957] 406
  murder, in [1959] 518
  possession of explosives [1957] 254
  vicarious liability [1956] 629
  wounding [1954] 672
Mental defectives [1955] 463, 499
Mental deficiency,
  carnal knowledge [1958] 52, 279–289, 330
  diminished responsibility [1957] 683
  habeas corpus [1957] 403; [1958] 258
  report on [1957] 426
  Scotland [1954] 509
Mental Health Act, 1959...[1959] 796, 870; [1960] 852
Merchandise Marks,
  cotton grey cloth [1954] 392
  exemptions [1960] 716
  false trade description [1954] 215; [1955] 270, 506, 574; [1956] 564; [1957] 404; [1959] 217; [1960] 438
  imported goods [1956] 706; [1957] 756; [1959] 223, 382, 534
  intent to defraud [1958] 507
  jute, [1954] 392
  prosecution for [1954] 490
  summary justice [1959] 208
  underweight goods [1954] 719
Merchant Shipping,
  Aden [1956] 64
  cargo on deck [1956] 485
  competency certificate [1957] 127, 697
  D.S.I.R. ships [1958] 61
  foreign deserters [1958] 266
  Humber [1956] 281
  Irvine pilotage [1954] 729

- Merchant Shipping—*cont.*
  - life saving [1956] 432; [1958] 409; [1959] 601
  - load line certificate [1959] 223
  - load line convention [1955] 53, 583; [1956] 65; [1957] 413; [1958] 61; [1959] 66; [1960] 218
  - medical scales [1955] 655
  - navigational warnings [1954] 314
  - New Hebrides [1955] 445
  - Nigeria, ships of [1957] 483
  - oil [1956] 575; [1957] 334, 697; [1958] 633, 764; [1959] 535
  - passenger returns [1954] 645
  - pilotage [1955] 380
  - registration [1955] 445
  - safety convention [1955] 53, 326; [1956] 136. 281, 706; [1957] 127, 697; [1958] 61; [1959] 66
  - seamen, refusal to sail [1957] 812
  - seamen's provisions [1957] 697
  - signals of distress [1954] 314
  - summary justice [1955] 642, 704, 770; [1956] 44, 116, 254, 325, 409, 478, 616; [1957] 181, 319
  - tonnage measurement [1956] 644
  - wireless telegraphy [1954] 481, 563
- Merchant Shipping Act, 1954,
  - commencement [1954] 562
  - extension of [1955] 259
- Metal dealers [1957] 38–41
- Metropolitan Magistrates' Courts Act, 1959...[1959] 796
- Metropolitan Police Act, 1839 (Amendment) Bill [1958] 420
- Metropolitan Police Act, 1839 (Amendment) Act, 1958 [1958] 702
- Metropolitan Police Cadet Corps [1960] 294
- Metropolitan Police Courts [1958] 337
- Milk. *See* Food and Drugs.
- Mines and Quarries,
  - china clay [1957] 335
  - coal mines [1955] 392, 583; [1957] 127, 483
  - dangerous occurrences [1957] 629; [1960] 218
  - explosives [1960] 219
  - liability for offence [1956] 629
  - references [1957] 128
  - subsidence [1957] 698
  - summary justice [1956] 616, 696; [1957] 110
  - ventilation [1957] 187
  - young persons in [1957] 628
- Mines and Quarries Act, 1954...[1955] 126; [1959] 368
- Ministers, transfer of functions [1955] 514
- Miscarriage of justice [1954] 382; [1956] 75, 149
- Misprisions, Compoundings and Compromises [1959] 750, 822–836
- Misprision of felony [1955] 291; [1960] 116
- Mistake, larceny in [1958] 221–232, 307–313
- Moneylender's certificate [1955] 114
- Montesi Case [1955] 359–364; [1958] 163
- Morocco,
  - jurisdiction [1957] 128
  - seamen deserters [1954] 153
- Motion,
  - indictment, to quash the [1958] 422
- Motor-scooter brakes [1957] 709
- Motor-vehicle,
  - cleaning [1960] 451
  - notifying ownership [1959] (p.p.) 303
  - offences relating to [1959] 611
- Murder,
  - accessory after [1954] 464
  - accessory before [1957] 814
- Murder—*cont.*
  - accomplice, who is [1954] 305
  - amendment of law [1956] 787
  - appeal [1960] 13
  - attempted [1959] 518
  - attempted, private prosecution [1954] 39–41
  - attempted suicide and [1957] 188
  - burden of proof [1955] 506
  - capital [1959] 780, 782, 784; [1960] 11
  - causation [1957] 429–40, 510–521
  - cause of death [1956] 513, 700; [1957] 813
  - Clapham Common [1954] 76, 305
  - concealment of birth [1954] 141
  - constructive,
    - accomplices and [1954] 765
    - jury discretion [1954] 435
    - malice [1957] 614
  - constructive malice [1954] 666; [1956] 77
  - criminal responsibility and punishment [1954] 661–86
  - Cristofi [1955] 63
  - deaf mute, indictment of [1954] 20–2
  - death, alleged date of [1958] 547
  - definition of [1959] 505
  - diminished responsibility [1957] 349, 354–364, 521–529, 616. *See also* Diminished responsibility.
  - direction to jury [1954] 60, 216, 867
  - drunkenness [1954] 867
  - duress [1957] 813
  - epilepsy and [1954] 442
  - evidence of earlier proceedings [1954] 143
  - evidence of other offence [1955] 644
  - fitness to plead [1957] 472
  - hanging [1956] 370
  - Homicide Act, 1957 [1957] 282–292
  - houseboat twins case, [1957] 80–95
  - "in course or furtherance of theft," meaning of [1958] 688
  - information for defence [1955] 522
  - insanity [1956] 335
  - intent [1954] 216, 217, 666, 670, 868; [1955] 315
    - test of [1956] 203, 375–383
    - to do violence [1954] 624, 668
  - joint trial [1957] 198
  - jury discretion [1954] 76
  - lion-man, by [1957] 814
  - malice [1958] 15–30. 714–721
  - mental defective [1954] 720
  - mistake, by [1956] 375–383, 580
  - non-capital, appeals [1957] 460
  - number of [1956] 445
  - onus of proof [1959] 557–569
  - palm print [1955] 434
  - pleas [1955] 98
  - poisoning [1954] 274
  - prerogative of mercy [1954] 664
  - principals [1957] 814
  - profit from [1956] 3, 441
  - provocation,
    - abuse [1954] 573, 721
    - adultery [1954] 902
    - court-martial [1957] 47
    - drunkenness [1954] 549
    - insanity [1955] 575
    - intentional killing [1954] 744
    - jury discretion [1954] 435
    - lack of self-control [1954] 742
    - mistake and [1954] 752
    - new law of [1958] 778–785
    - onus of proof [1957] 618; [1959] 564, 584
    - oral [1957] 815
    - physical peculiarities [1954] 747, 905
    - reasonable man and [1954] 740–54, 898–906

- Murder—*cont.*
  - provocation—*cont.*
    - self-defence and [1954] 621; [1957] 816; [1959] 786
    - time to cool [1955] 783
    - Western Samoa, in [1959] 697–704
    - wife's unfaithfulness [1956] 125; [1959] 584
  - Queen's peace [1954] 61
  - Ratcliff Highway [1956] 90–100
  - Reasonable Man, the, and [1958] 289–298, 374–382, 453–465
  - re-definition of [1960] 728
  - repeated [1960] 13
  - responsibility for [1955] 435
  - retrial [1956] 486
  - self-defence [1955] 187; [1957] 816
  - statistics [1957] 428, 501; [1960] 660
  - thief, of [1958] 520
  - threatening to [1960] 714
  - Towpath [1954] 179–88
  - two charges of, in single indictment [1958] 475
  - Truth drug [1954] 321, 423–34, 482
  - without a body [1955] 158–69, 188, 205–15
- Muscat [1956] 61
- Music,
  - licences [1959] 734
  - licensed premises on [1954] 935; (p.p.) [1957] 339, 613
- Mute,
  - deaf [1954] 20–2
  - fitness to plead [1954] 20

- Narcotics [1956] 316–319
- National Assistance,
  - summary justice [1956] 44, 826; [1957] 681
- National Insurance,
  - contributions [1956] 272; [1957] 619
  - mentally sick criminals [1954] 937
  - summary justice [1955] 641, 769; [1956] 44
- National Service [1955] 115, 380, 390; [1956] 629
  - summary justice [1956] 187, 253
- National Service Act, 1955 [1955] 390
- Naval Discipline Act, 1957...[1957] 669–671, 691; [1959] 66
- Navy, Army and Air Force Reserves Act, 1954 [1954] 312
- Negligence, highway on [1957] 351
- New Forest [1955] 122
- Newspaper,
  - contempt of court [1960] 251, 265
  - trial by [1958] 569
- New York, mad bomber [1957] 143
- New Zealand letter [1956] 799–804; [1957] 159–163; [1958] 101–108
- Nigeria,
  - action for contempt [1955] 682–5
  - appeals [1955] 442
  - emergency powers [1956] 430, 498
  - shipping [1957] 483
- Night poaching [1959] 853, 858
- Nina Ponomareva [1956] 725–730
- No case to answer,
  - submission of [1958] 232–241
- Noisy instrument [1958] 803
- Nolle prosequi [1958] 573–582; [1960] 841
- Northern Ireland [1955] 392, 445, 461, 580, 719
  - administration of justice [1956] 305–315, 466–474
  - capital punishment in [1956] 750–758
  - corporal punishment [1956] 814–21
  - criminal law in [1956] 3, 7–18, 151–168, 305–315
- Northern Ireland—*cont.*
  - law reform, in [1956] 151–168
  - milk [1957] 125, 412
  - special powers in [1956] 7–18
  - welfare foods [1957] 332
- Northern Ireland Act, 1955 [1955] 392
- Northern Rhodesia,
  - habeas corpus [1959] 658
- Notices,
  - adequacy of, in licensing [1958] 539
- Nottingham chief constable [1959] 545
- Nuclear Installations (Licensing and Insurance) Act, 1959...[1959] 793
- Nuisance,
  - summary justice [1956] 115, 254, 616, 696
  - wireless noise [1954] 794
- Nurses Act, 1957 [1957] 334
- Nurses Agencies Act, 1957 [1957] 334

- Oaths [1955] 700; [1957] 3, 143, 178; [1958] 324
- Obscene language [1959] 294
- Obscene Publications,
  - Bill on [1955] 218–26
  - horror comics Act on [1955] 442
  - law of [1954] 817–33; [1955] 3, 55
  - limited company, by [1955] 250
  - onus of proof [1954] 551
  - Select Committee [1958] 4
  - standards applicable [1954] 574, 593–7, 813, 817–33
  - summing up [1954] 593–7
  - test of obscenity [1954] 384, 817–33, 868
- Obscene Publications Act, 1959...[1959] 796
- Obscenity, purveyor of [1959] 612
- Obstruction cases,
  - private prosecution [1959] 836
- Obstructing,
  - police, the [1958] 100
  - street, the [1958] 384
- Obtaining by false pretences [1959] 626–633, (p.p.) 741; [1960] 435, (p.p.) 444, 845
- Obtaining credit by fraud [1956] 565; [1959] 729; [1960] (p.p.) 223
- Occasional Licences and Young Persons Act, 1956 [1956] 643
- Offences against the Person,
  - administering noxious thing [1957] 326, 473
  - spring gun [1954] 625
- Offensive weapons,
  - air rifle [1954] 378
  - knives [1957] 280; [1958] (p.p.) 341, 754; [1959] 535
  - prosecutions [1956] 515
  - sheath knife [1960] 133
  - shotgun [1954] 379
  - skean dhu [1954] 321, 379, 507
  - spring gun [1954] 625
  - unlawful possession [1954] 378
- Official Secrets,
  - atomic energy [1954] 645; [1955] 719; [1956] 778
  - construction [1959] 456
  - prohibited places [1954] 393; [1955] 53, 392, 719; [1959] 66
  - summary justice [1956] 324, 478
- Oil in navigable waters [1956] 575; [1957] 334
- Oil in Navigable Waters Act, 1955 [1955] 447
- Old Bailey,
  - cells at [1957] 279
  - chronicle [1956] 2, 369
  - oath [1957] 3

- Opencast Coal Act, 1958 [1958] 700
- Open spaces [1956] 645; [1957] 484
- Opticians,
  - Act, 1958 [1958] 631; [1959] 66
  - registration of [1958] 631
- Oslo, court scene [1955] 302–5
- Outlook for a Devil in the Colonies [1958] 661–675

- Paper,
  - control of [1955] 124, 445, 655
  - scientific examination of [1954] 258
- Parking [1957] 6–12; [1960] 593, 595, 717
  - meters [1960] 417, 645
  - summons headings [1957] 13–14
- Parks [1956] 254
- Parliament [1955] 3, 63, 134, 203, 270, 336, 403, 462, 522; [1956] 4, 76, 149, 219, 295, 372, 444, 513, 587, 790; [1957] 4, 78, 216, 280, 353, 427, 501; [1958] 4, 71, 276, 347; [1959] 38–41, 80, 233–238
- Peace officers,
  - arrest by [1954] 408–22
- Pedestrian crossing [1960] 710
- Pedestrians [1956] 788
- Pedlars [1956] 837
- Peeping Toms [1954] 121
- Penal Practice in a Changing Society [1959] 157, 183–186
- Penal reform [1957] 770
- Penalties, Legal,
  - Revaluation, the Need for [1959] 393–410
- Pencil writing,
  - scientific examination of [1954] 255
- Pensions [1954] 803; [1956] 706; [1956] 201
- Pensions Increase Act, 1956 [1956] 500
- Perjury,
  - certiorari [1956] 48
  - Comer trial [1956] 369
  - Ceylon [1956] 420
  - false statement [1955] 712
  - income tax returns [1954] 354
  - marriage declaration [1956] 421
  - no civil action for [1958] 756
  - subsidy payment [1957] 328
- Perpetuation of Testimony,
  - proposals to improve [1959] 313–316
- Persistent offender [1954] 889–98
- Pest control [1954] 480, 481; [1955] 259, 327, 720; [1956] 181, 353, 433, 778; [1957] 66, 129, 335, 484; [1958] 137, 337; [1959] 67, 224, 382, 383, 601; [1960] 282, 782
- Pests Act, 1954 [1955] 45
- Petrol [1957] 265, 331, 484; [1958] 337
  - summary justice [1957] 180, 319, 401
- Petty sessional divisions
  - Anglesey [1954] 150
  - Bedfordshire [1954] 151
  - Berkshire [1954] 480
  - Buckinghamshire [1954] 150
  - Cornwall [1956] 136
  - Dengie & Maldon [1955] 62
  - Devon [1954] 876
  - Durham [1954] 803
  - Essex [1955] 53
  - Flintshire [1954] 150
  - Gloucestershire [1955] 512
  - Herefordshire [1954] 314
  - Hertfordshire [1955] 125
  - Huntingdonshire [1957] 483
  - Kent (East) [1954] 150
  - Lancashire [1954] 392; [1958] 137, 488; [1960] 218, 782
  - Lincoln (Parts of Lindsey) [1959] 382
- Petty sessional divisions—*cont.*
  - Lincolnshire [1956] 351
  - Monmouthshire [1954] 876
  - Montgomeryshire [1958] 137
  - Norfolk [1954] 392
  - Northamptonshire [1959] 601
  - Nottinghamshire [1954] 151
  - Oxfordshire [1954] 392
  - Pembrokeshire [1954] 948
  - Shropshire [1954] 391, 803; [1955] 53; [1960] 143
  - Somerset [1954] 391
  - Staffordshire [1954] 150; [1955] 719; [1957] 413
  - Suffolk (East) [1955] 362; [1958] 137
  - Suffolk (West) [1957] 201
  - Surrey [1954] 151
  - Sussex (West) [1955] 512
  - Westmorland [1954] 150
  - Worcestershire [1955] 125
  - Yorks (E. Riding) [1955] 362; [1958] 702
- Photography [1957] 215, 708
- Pharmacy Act, 1954...[1955] 53
- Pig [1954] 635, 725, 799
  - larceny of [1954] 695–7
- Plea,
  - change of [1955] 191; [1957] 317
  - fitness to plead [1954] 20, 551, 565; [1957] 605, 821; [1959] 847; [1960] 79
  - guilty, by letter [1959] 605, 852
- Poaching [1955] 641; [1956] 115, 408, 545
- *Podola*, decision in [1960] 79
- Poisons,
  - agriculture [1954] 633; [1959] 148
  - calcium arsenates [1959] 148
  - containers, etc. [1958] 558
  - methylpentynol [1955] 583
  - monofluoroacetic acid [1958] 558
  - phosphorus compounds [1954] 804; [1958] 347, 558
  - rules [1954] 393; [1957] 336; [1960] 500
  - strychnine [1957] 336
  - summary justice [1955] 770
  - tri-2(-chloroethyl)amine [1954] 393
- Police,
  - action against [1954] 145
  - allowances [1956] 282
  - annual reports [1956] 512
  - appointments [1957] 5
  - area [1958] 558
  - arbitration tribunal [1956] 789
  - arrest by [1954] 6–20, 408–22; [1955] 251; [1958] 73, 154–162
  - assault on [1956] 336; [1957] 563
  - B.B.C. programme [1957] 427
  - bail, power to grant [1959] 706
  - Book for, the [1959] 350–355
  - cadet corps [1960] 294, 727
  - Chief Constables' reports [1954] 322; [1955] 402
  - civil defence [1954] 393
  - college [1957] 279
  - college, Scotland [1954] 914–6
  - Committee on [1955] 732
  - conditions of service [1960] 150
  - control of intending criminals [1955] 66–75, 136–47
  - costs against [1955] 4
  - court. *See* Police court.
  - damages for injury to [1957] 119
  - detective duty allowance [1954] 225
  - detention by [1956] 414
  - disciplinary board [1956] 422; [1960] 449
  - discipline [1954] 406; [1955] 128, 327
  - discretion of [1954] 271–3, 490, 939; [1958] 82
  - dog, tracing accused with [1954] 49
    - use of [1955] 523, 730

Police—*cont.*
  duties of [1956] 514; [1960] 782
  emergency calls [1957] 75
  enforcement of betting laws [1955] 3
  exhibition [1955] 65
  experiments [1956] 656
  false arrest [1955] 184
  federation [1959] 535
  fining on the spot by [1960] 14
  gambling, discretion as to [1954] 271–3
  gang warfare [1956] 511
  Glasgow [1957] 500
  Hampshire [1957] 414
  identification methods [1956] 723
  increasing crime and the [1958] 642
  injury to [1955] 381
    recovery of wages [1956] 567, 631
  inquiries for foreign police [1954] 887
  Interpol [1955] 3
  Irish constabulary [1954] 394, 646
  juvenile liaison officers [1956] 442
  lottery, discretion as to [1954] 271–3
  malpractices by [1958] 565–568
  Metropolitan [1954] 491; [1955] 523; [1956] 77, 150, 444
    London allowance [1954] 225
    reorganisation [1954] 160
    report [1955] 460
    specials [1957] 280
    statistics [1954] 738
    suspected persons and [1955] 251
  national service of [1955] 271
  note books [1959] 126; [1960] 160
  notes [1954] 815, 833–5, 951
  Nottingham [1959] 545
  obstruction [1955] 189; [1958] 100
  omission from statement taken by [1954] 467
  overtime allowance [1954] 225
  Parliament, in, the [1959] 233–238
  pay [1954] 74, 225; [1956] 136, 138, 296, 588; [1957] 129; [1959] 67; [1960] 150, 220
  pensions [1954] 151, 307, 480, 646; [1955] 3, 64, 127, 392, 446; [1956] 354, 357, 500, 707; [1957] 201; [1960] 220, 575, 645
  photography [1957] 215
  powers [1955] 427; [1959] 79, 545
  Press and [1955] 202
  promotion [1956] 778
  prosecution by [1955] 255; [1956] 169–174, 213; [1957] 769, 796
  prosecutions, costs [1954] 519
  provincial police forces [1959] 80, 234
  questioning by [1954] 504; [1957] 427; [1960] 293, 298, 325, 598, 716
  radar and [1957] 143
  railway strike, in [1955] 462
  rating [1955] 656
  recording machines [1954] 100
  recruitment [1954] 74, 887; [1955] 204, 462, 730
  regulations [1955] 128, 512, 584, 593; [1956] 848; [1957] 414
  report of Commissioner of [1959] 611
  report on [1955] 202; [1956] 293; [1957] 560
  report to C.C.A. [1957] 237
  restitution of property [1957] 189, 461
  road traffic offences [1955] 320
  road traffic regulations and [1956] 487
  Royal Commission on [1960] 73, 230
  Royal Irish Constabulary [1956] 433
  Scotland [1954] 226, 393, 480, 914–6; [1957] 336, 485, 826
  search [1957] 217
  special constables [1954] 480; [1957] 280, 485

Police—*cont.*
  statement to [1954] 467
  statistics [1957] 79
  summary charges by [1954] 405
  superannuation [1960] 575
  team-policing [1954] 173–8, 262–70, 489
    briefing [1954] 176
    daily work [1954] 262–8
    effect of the system [1954] 268–70
    operational personnel [1954] 174
    phases of [1954] 262–7
    recording of duties, etc. [1954] 267
  traffic wardens [1960] 782
  training [1959] 237
  transport [1956] 790
  underwater unit [1957] 500
  vehicles [1957] 78
  wasting time of [1956] 568
  widows' pensions [1954] 394, 491
Police court. *See also* Magistrates' Courts.
  applications [1954] 188–96
  bastardy [1954] 921
  binding over [1954] 851
  " charges-up " [1954] 280–9
  day in [1954] 31–8, 115–21, 188–96, 280–9, 359–67, 451–8, 522–34, 610–7, 698–706, 770–80, 844–53, 920–9
  debts [1954] 844
  domestic troubles [1954] 926
  end of the day [1954] 920
  grievous bodily harm [1954] 698, 701
  highway, use of [1954] 359–67
  housebreaking [1954] 522–34
  interval for refreshments [1954] 701–6
  introduction [1954] 31–8
  liberty of the subject [1954] 359–67
  motoring offences [1954] 770–80
  preparations [1954] 115–21
  railway frauds [1954] 845
  remands [1954] 610–7
  shoplifter [1954] 451–8
  Thames, letter books of [1956] 680–687
Police Federation Act, 1959...[1959] 535
Police, Fire and Probation Officers Remuneration Act, 1956...[1957] 129
Police (Property) Act, 1897, s. 1 [1958] 744–748
Police (Scotland) Act, 1956...[1956] 357
Policy of the *Review* [1956] 1
Pool Betting Act, 1954...[1954] 637
Possession, in larceny [1958] 534
Post mortem [1959] 316–321
Post Office,
  execution of documents [1954] 562
  frauds [1954] 489; [1955] 18–26, 133
  inland post [1956] 137
  opening letters [1957] 502–510
  summary justice [1956] 187, 325; [1957] 319, 401; [1958] 616
Posters, unlawful display of [1958] 680
Potatoes,
  importation of [1958] 489, 557
Poultry,
  dealer [1958] 191
  slaughtering of [1958] 698
Practical Problems,
  (1–4)...[1956] 282
  (5–7)...[1956] 358
  (8–10)...[1956] 435
  (11–13)...[1956] 505
  (14–15)...[1956] 578
  (16–17)...[1956] 651
  (18)...[1956] 711
  (19)...[1956] 780
  (20–21)...[1956] 850
  (22–23)...[1957] 67
  (24)...[1957] 133
  (25–26)...[1957] 203
  (27–29)...[1957] 266
  (30–31)...[1957] 339, 419

Practical Problems—*cont.*

- (32–33)...[1957] 488
- (34)...[1957] 552
- (35)...[1957] 632
- (36)...[1957] 701
- (37–38)...[1957] 758
- (39)...[1957] 827
- (40)...[1958] 63
- (41)...[1958] 138
- (42)...[1958] 197
- (43)...[1958] 269
- (44)...[1958] 341
- (45)...[1958] 410
- (46)...[1958] 491
- (47)...[1958] 560
- (48)...[1958] 634
- (49)...[1958] 705
- (50)...[1958] 766
- (51)...[1958] 828
- (52)...[1959] 69
- (53)...[1959] 151
- (54)...[1959] 225
- (55)...[1959] 303
- (56)...[1959] 385
- (57)...[1959] 475
- (58)...[1959] 538
- (59)...[1959] 603
- (60)...[1959] 669
- (61)...[1959] 741
- (62)...[1959] 800
- (63)...[1959] 870
- (64)...[1960] 67
- (65)...[1960] 145
- (66)...[1960] 223
- (67)...[1960] 285
- (68)...[1960] 378
- (69)...[1960] 444
- (70)...[1960] 503
- (71)...[1960] 578
- (72)...[1960] 784
- (73)...[1960] 852
- assault, exemption from damages [1959] 279

Practice and Procedure,

- assizes [1954] 39–41, 291; [1956] 615; [1957] 539; [1958] 801; [1960] 357
- Central Criminal Court [1958] 39, 125, 247, 466, 539, 615
- Chancery Division,
  - application for committal for contempt [1954] 787
- committal for sentence [1959] 581
- coroner's court [1954] 46, 619, 782; [1955] 372, 563; [1956] 406; [1957] 108
- costs [1959] 838
  - on appeal [1959] 356
- Court of Criminal Appeal [1954] 42, 289, 368; [1957] 460; [1959] 518; [1960] 356
- courts-martial [1957] 108; [1959] 651
- divisional court [1954] 461; [1956] 319
- First Offenders Act, 1958...[1959] 117, 207
- habeas corpus [1960] 263
- indictment, duplicity in [1960] 554
- Ireland, return of offenders to [1958] 614
- juvenile courts [1955] 176
- licensing justices [1958] 539
- magistrates' courts [1954] 44, 128, 202, 291, 370, 462, 537, 618, 709, 782, 862; [1955] 107, 243, 306, 430, 561, 636, 700; [1956] 111, 184, 249, 320, 475, 542, 693; [1956] 823; [1957] 179, 238, 398, 460, 671; [1958] 84, 181, 247, 321–324, 679, 751
- oath, Sikhs and the [1958] 324
- parking meters [1960] 417
- Poor Prisoners' Defence Act, 1930...[1960] 55

Practice and Procedure—*cont.*

- preventive detention [1959] 44
- Prison Commissioners' Report [1959] 652
- quarter sessions [1954] 43, 127, 199, 290, 368, 461, 535, 707, 781, 861, 932; [1955] 37, 105, 242, 371, 496, 636; [1956] 39, 249, 405; [1957] 178, 398, 539; [1958] 383, 801
- recognisances [1960] 113
- reform [1959] 546
- road traffic offences [1959] 42
- sentence [1959] 437; [1960] 264
- taking offences into consideration [1960] 356
- trial in open court [1960] 488

Prediction studies [1955] 604–7

Prediction tables [1954] 440

Preparation of Important Documents, the [1959] 421–436, 673

Press,

- intolerable behaviour by [1959] 390

Prevention of Fraud (Investments) Act, 1958...[1958] 700

Preventive detention [1954] 896

- effect of [1955] 203
- eligibility [1959] 295
- imprisonment and [1956] 120, 128, 209, 343, 495; [1957] 62
- length of [1954] 66, 554
- man aged 56 [1955] 510
- material age [1954] 385
- maximum sentence [1956] 210
- minimum sentences [1955] 269
- notice of convictions [1955] 254
- Nottingham prison [1954] 887
- previous convictions [1956] 405; [1959] 859
  - proof of [1954] 309; [1957] 60
- Prison Commissioners' Report [1959] 44
- public safety [1955] 653
- qualifications for [1954] 892; [1958] 179
- remission of sentence [1954] 337
- review of sentence [1957] 157, 457; [1958] 243, 316, 403, 483, 555, 626, 760, 823, 824; [1959] 62, 220, 300, 374, 530, 737, 867; [1960] 137, 214, 255, 372, 440, 572, 845, 846
- special treatment [1955] 116
- supervision order [1959] 591
- term of [1957] 686
- treatment of prisoners [1955] 271
- use of [1955] 4
- when appropriate [1954] 66

Previous convictions,

- evidence of similar facts [1957] 449–455
- information as to [1955] 175
- notice of [1958] 801
- proof of [1958] 181

Previous Inconsistent Statement [1958] 169–171

Principal in the second degree [1957] 488, 814

Prison,

- accommodation [1956] 296, 372
- booklet on [1957] 352
- breaking [1957] 465; [1960] 775
- building programme [1960] 150
- China, in [1956] 740–750
- Dartmoor [1954] 238
- debate on [1955] 336; [1956] 587; [1957] 278
- discharged prisoners [1954] 238, 407
- Eastchurch Open Prison [1955] 134
- elderly prisoners [1955] 336
- escapes from [1955] 4; [1956] 337
- holidays from [1954] 161
- improvement [1956] 445
- ju jitsu [1954] 161
- Liverpool [1957] 77

- Prison—*cont.*
  - medical treatment [1954] 491; [1960] 689
  - new [1955] 64; [1956] 76
  - Nottingham [1954] 887
  - officers [1955] 667, 732
  - officer's pay [1956] 295
  - open [1955] 134, 169–172, 667; [1957] 708
  - overcrowding [1954] 238
  - psychiatric treatment [1954] 441, 659; [1960] 519
  - preventive detention [1954] 491
  - prisoner attacked [1956] 56
  - report [1954] 813; [1955] 594; [1957] 77
  - rules [1955] 116; [1956] 56; [1957] 131; [1960] 433
  - Russia, in [1956] 723
  - Scotland [1954] 226, 395; [1955] 96
  - sexual offenders [1954] 323
  - social workers [1954] 339
  - staff of [1957] 142, 281
  - statistics [1957] 216
  - Straffen [1956] 373
  - summary justice [1956] 826; [1958] 616
  - transfer of prisoners [1954] 407
  - Wandsworth [1954] 576
  - work in [1954] 407; [1956] 372; [1957] 216
- Prison Commissioners,
  - recommendation of [1954] 63
  - report [1957] 281; [1959] 44, 611, 652
  - reports by [1957] 353, 460
- Prisoners,
  - after care [1956] 148; [1957] 2, 350; [1960] 230
  - attack on [1956] 56
  - compensation for attack [1955] 524
  - employment of [1960] 74
  - habilitation scheme [1955] 524
  - letters [1955] 524
  - National Insurance of [1955] 134
  - questioning of [1957] 490
  - resettlement of [1955] 134
  - treatment of [1955] 64; [1956] 5; [1960] 689
  - work of [1956] 791; [1957] 770
  - young, centre for [1960] 695
- Private prosecution [1954] 39–41; [1958] 577
- Privilege, Crown [1960] 362
  - civil proceedings, in [1959] 11
  - criminal proceedings, in [1959] 12
- Privy Council,
  - appeals to [1954] 946; [1957] 692
  - Ceylon Criminal Procedure Code [1958] 548
  - members of [1957] 485
  - onus of proof [1956] 488
- Probation,
  - allowances [1957] 336
  - appeal [1958] 112
  - Armed forces and [1954] 932
  - aspects of [1958] 740–744
  - breach of [1954] 289, 290, 368, 693; [1956] 273; [1957] 105–107, 254, 405; [1958] 554, 555; [1960] 202
  - Committee, allowances to [1960] 282
  - condition [1958] 627
  - conditions of service [1960] 501, 782
  - discharge, and [1958] 743
  - farm home [1955] 336
  - fifty years [1957] 280, 351
  - hostels [1957] 4
  - offences committed during [1959] 132
  - officer, salary of [1959] 383, 738; [1960] 782
  - order [1954] 692; [1959] 133
  - qualifications for [1958] 176
  - residence requirement [1956] 766
- Probation—*cont.*
  - review of sentence [1958] 319, 825; [1959] 64, 140, 220, 470, 532, 665; [1960] 65, 140, 277, 374
  - rules [1954] 394, 949; [1955] 128, 446; [1956] 137, 356, 778; [1957] 698; [1959] 602
  - Scotland [1954] 563; [1956] 503; [1959] 602
  - sentence for original offence [1955] 242
  - Service Committee [1959] 482
  - summary justice [1955] 641, 704
  - unlawful conviction [1958] 259
  - use of [1954] 340, 691
- Probation officers,
  - age of [1960] 782
  - appointment of [1958] 712
  - conference [1955] 204
  - pay [1955] 326; [1957] 129; [1958] 338, 827; [1960] 782
  - pensions [1954] 803–4; [1957] 201
  - report [1957] 3
- Proceedings before examining justices, Report of the Departmental Committee on [1958] 647–653
- Procedure, reform [1959] 546
- Procure, attempting to [1959] 774
- Proof [1956] 289
- Prosecution,
  - application for summary trial [1958] 694
  - civil proceeding and [1958] 33–38
  - costs against [1960] 120
  - costs of [1960] 187
  - discretion [1956] 222–231, 506, 783
  - English and French methods [1955] 272–82
  - local authorities, by [1954] 929–32
  - police, by [1956] 167–174, 213; [1957] 769, 796
  - power to initiate [1955] 596–604, 668–79, 798; [1956] 67
  - private [1954] 39–41; [1959] 161
  - prosecuting counsel [1955] 739–48
  - Scotland, in [1956] 104–110
  - withdrawal of [1956] 725–730; [1959] 833
  - witnesses, duty as to [1956] 823; [1958] 547; [1960] 437
- Prosecuting Officer,
  - complaints [1960] 160, 243, 391
  - evidence, the meaning of [1959] 96–98
  - introductory remarks [1959] 5–10
  - Newman's first case [1959] 250–256
  - Newman in court [1959] 759–773
  - past imperfect [1959] 484–490, 569–580
  - post mortem [1959] 316–321, 810–819
- Prosecution statement,
  - right of defence as to [1959] 360
- Prostitution,
  - common [1960] 523
  - debate on [1956] 295
  - directories [1960] 705
  - female prostitute [1956] 611–614, 713, 781
  - Kaleidoscope [1958] 793–798
  - living on earnings [1954] 147; [1956] 338; [1957] 214, 229–37, 255, 405
  - premises let [1956] 126, 274
  - report on [1957] 637, 665–668
  - soliciting from window [1960] 709
  - statistics [1956] 217, 588
  - street [1959] 391
- Protection of Animals (Amendment) Act, 1954...[1954] 634
- Protection of Animals (Anaesthetics) Act, 1954...[1954] 725
- Protection of Birds Act, 1954...[1954] 638
- Provocation. *See* Murder.

- Psychiatry,
  - prisons, in [1954] 441, 659
- Psychopathy [1959] 331
  - insanity and [1954] 22–9, 144
- Public entertainment,
  - summary justice [1956] 115, 477; [1960] 836
- Public Health,
  - appeals from local authorities [1954] 707
  - clean air [1958] 266, 338, 559
  - noisy animals [1955] 252
  - pneumonia [1955] 583
  - puerperal pyrexia [1955] 129
  - rag and bone dealers [1954] 218
  - rheumatism regulations [1954] 226
  - smoke [1958] 55
  - summary justice [1956] 826; [1957] 401, 681
  - visiting forces [1954] 558
- Public justice,
  - perversion of [1959] 587
- Public lectures [1955] 63, 269
- Public mischief [1954] 51; [1955] 116; [1956] 437; [1958] 522
- Public Service Vehicles (Travel Concessions) Act, 1955...[1955] 446
- Public Service Vehicles,
  - drivers' and conductors' licences [1959] 798; [1960] 783
  - fitness [1958] 339; [1959] 383
  - passengers [1958] 339
  - steering arms [1958] 559
- Punishment. *See* Sentence.
  - capital [1954] 4
  - corporal [1954] 4; [1960] 382
  - crime and, the Government view [1958] 773
  - criminal responsibility and [1954] 661–86
  - principles of [1957] 141, 155–159, 455–459, 536–539; [1958] 242–246, 313–321, 402–406, 553–557, 624–627, 758–760, 822–825; [1959] 61, 138, 219, 299, 373, 468, 529, 596, 737, 865; [1960] 65, 137, 214, 275, 371, 439, 640
  - treatment and, since 1948 [1954] 687–94

- Quarter Sessions,
  - additional courts [1959] 798
  - appeal committee,
    - costs, awarding of [1954] 469, 519
    - documents given to [1955] 774
    - fine by [1959] (p.p.) 225
    - status of [1954] 861
  - appeals from local authorities under Public Health Acts [1954] 707
  - appeals to [1954] 199–201, 218; [1958] 109
    - costs on [1954] 618, 938
    - plea of guilty [1957] 752
    - police pensions [1954] 307
    - procedure [1958] 110
  - arraignment [1957] 539
  - Borstal training, power to order [1955] 37
  - breach of probation [1954] 290, 368
  - case stated,
    - appeal by [1958] 112
    - preparation of [1955] 249
    - recognisances [1954] 535
  - cases from [1956] 2
  - committal order to C.C.A. [1957] 398
  - committal to,
    - for sentence [1954] 368; [1955] 191, 379, 651; [1959] 581, 658
    - for trial [1954] 291; [1955] 479–83, 665; [1956] 67
    - power of C.C.A. [1954] 375

- Quarter Sessions—*cont.*
  - committal to—*cont.*
    - validity of [1954] 866
  - corrective training [1954] 44
  - costs awarded by [1954] 518–21
  - dating orders of [1954] 781
  - detention centre [1954] 462
  - disqualification to drive, removal of [1954] 461; [1955] 767
  - evidence at [1958] 64
  - examining justices at [1954] 43, 66
  - imputations on magistrates on appeals to [1956] 39
  - jurisdiction [1955] 117; [1957] 116; [1958] 683; [1959] 658
  - jury's oath [1957] 178
  - Lancashire [1954] 658
  - London [1954] 323
  - notice of previous convictions [1958] 801
  - order of,
    - dating [1954] 781
    - effect of [1956] 41
  - preventive detention [1954] 44
  - probation orders for H.M. forces [1954] 932
  - quashing indictment [1955] 371, 496
  - recorders [1956] 355
  - restitution of stolen property [1954] 127
  - sentence for summary offences [1955] 105
  - sentencing, powers of [1958] 172–180
- Questioning of accused [1957] 490
  - detained for [1959] 79

- *R.* v. *Vickers* reconsidered [1958] 714–721
- Racial disturbances in Nottingham [1960] 673
- " Race riots " in London [1958] 709
- Radar Speed Meter, the [1958] 349–360
- Radar, use of [1957] 499, 564
- Radioactive Substances Act, 1960...[1960] 642
- Rag and bone dealers,
  - gift of article [1954] 218
- Rag flock [1954] 729
- Railways,
  - charges [1955] 53
  - light [1960] 576
  - obstructing [1960] 195
  - summary justice [1955] 564, 641, 704, 770; [1956] 115, 188, 408, 478, 546; [1958] 31, 384
  - touting for custom at [1954] 939
- Rape,
  - attempted [1959] 209
  - consent to [1957] 394; [1959] 450, 458
  - corroboration of evidence [1955] 508; [1960] 422
  - evidence of, on murder charge [1954] 185
  - fake ceremony of marriage [1958] 523
  - husband, by [1954] 219
  - sentence [1955] 193, 578
  - without indecent assault [1954] 280
- Rating and Valuation (Miscellaneous Provisions) Act, 1955...[1955] 656
- Reasonable Man, the, Murder and [1958] 289–298, 374–382, 453–465
- Receiving,
  - accessory to [1959] 45
  - accomplice of thief [1954] 333
  - burden of proof [1955] 464, 576
  - corroboration in Scots law [1958] 476
  - direction to jury [1956] 57
  - evidence of [1960] 630
  - evidence of previous conviction [1957] 474

- Receiving—*cont.*
  - felonious receipt [1955] 435; [1960] 32, 134
  - fraudulent conversion, after [1958] 813
  - indictment [1954] 475; [1955] 192; [1957] 685
  - intermediary [1955] 651
  - larceny and [1956] 46
  - misdemeanour, after [1959] 128
  - notice of previous conviction [1958] 549
  - possession of stolen goods [1956] 489; [1960] 26
  - taking into possession [1957] 476
- Recidivism [1955] 686–9
- Recognisances,
  - appeal [1958] 112
  - conditions attaching to [1958] 736; [1959] 57; [1960] 113
  - definition [1958] 174, 735
  - enforcement of [1958] 737
  - failure to enter, in time [1954] 535; [1958] 736
- Recording,
  - court proceedings and [1954] 854–60
  - magnetic [1954] 100, 854–60
  - mechanical [1954] 96
  - statements, of [1954] 96–105
- Recovery of stolen property [1957] 621
- Reform of law [1957] 707; [1959] 546
- Remand centres [1956] 221
- Remand home,
  - detention in [1954] 659, 801
- Rent Act, 1957...[1957] 549
- Rent control, excess rent [1957] 622
  - premium [1957] 751
- Representation of the People (Amendment) Act, 1958...[1959] 145
- Reputed thief [1958] 115
- Restitution of stolen property [1954] 127; [1957] 189, 305–316, 377–388, 553, 761
- Restriction of Offensive Weapons Act, 1959...[1959] 535, 647
- Restrictive trade practices [1957] 133
- Restrictive Trade Practices Act, 1956...[1956] 710
- Revenue,
  - control [1956] 356, 648, 707, 848; [1957] 131, 415, 486, 550; [1958] 267, 410; [1959] 384, 472, 602; [1960] 143, 220, 282, 646
  - frauds at common law [1954] 354–59; [1956] 290, 333
- Revision of the Army and Air Force Acts (Transitional Provisions) Act, 1955...[1955] 441
- Rhodesia and Nyasaland,
  - member of court of [1957] 485
- Rights of Entry (Gas and Electricity Boards) Act, 1954...[1954] 390
- Rivers [1955] 705, 770; [1956] 826; [1957] 45; [1959] 119
  - pollution [1960] 576, 648
  - summary jurisdiction [1957] 802
  - Tay Board 1957] 756
- Road and Rail Traffic Act, 1933,
  - use of lorry under [1958] 693
- Road Traffic,
  - accident, failure to notify [1955] 317, 382, 712; [1956] 274; [1958] 251
  - accident, failure to stop after [1959] 462
  - aiding and abetting offence (p.p.) [1957] 632; [1959] 719; [1960] 711
  - automatism [1958] 620; [1959] 660
  - brakes [1955] 784; [1956] 838
    - inefficient [1957] 622
    - pedal cycles [1954] 729; [1955] 4
  - by-law [1959] 853
  - C licence [1957] 190
    - carriage for hire [1954] 471
- Road Traffic—*cont.*
  - careless driving [1954] 537, 575, 647, 731, 807, 878, 939; [1955] 238–41, 330, 452, 786; [1956] 205, 275; [1959] 463, 735, 786; [1960] 270
  - car park, whether road [1958] 817
  - carriage of goods [1955] 42
  - certificate as to driver [1957] 351
  - charges [1955] 54
  - Chief Constable and [1956] 76
  - circumstances of the case [1955] 755–63
  - classification of vehicle [1955] 118, 679–82
  - construction and use [1954] 152, 730
    - brakes, defective [1954] 626
    - pedal cycle [1954] 729
    - permitting use [1954] 552
    - regulations [1955] 393; [1956] 433; [1957] 337, 550; [1960] 143, 221
    - special types [1956] 575, 708; [1958] 490
    - steering, defective [1958] 397; [1959] 282
    - track laying vehicles [1955] 583; [1957] 338, 550; [1960] 143
    - weight of lorry [1958] 479
  - corporation property, damage to [1960] 62
  - crossing, limits of [1960] 710
  - cul-de-sac, road as [1960] 497
  - cycle racing [1960] 283
  - dangerous driving [1954] 537, 575, 647, 731, 807, 878, 939, 940; [1955] 238–41, 318, 319, 330, 452; [1956] 204, 292; [1957] 468, 817; [1958] 192, 817; [1959] 459, 660, 854; [1960] 135, 430
  - death by dangerous driving [1957] 191, 214, 406; [1959] 660; [1960] 135, 273, 430
    - sentence [1957] 709
  - defence [1954] 641
  - direction indicators [1955] 203
  - disqualification [1954] 386, 472; [1955] 118, 311, 319, 383, 430, 508, 679–82, 729, 767; [1956] 127, 339, 340, 432, 515, 722; [1959] 461, 735; [1960] 203
    - driving during [1954] 795, 816; [1960] 34, 196
    - procedure for removal of [1954] 461
    - special reasons against [1958] 619
  - dock roads [1957] 66
  - drink [1960] 135, 149, 152, 432
  - driver, identifying [1959] 325
  - driving along, duty when [1959] 494
  - driving licence,
    - amendments [1957] 629; [1960] 719
    - disease, effect of [1955] 785
    - fee [1956] 848
    - production of [1960] (p.p.) 378
    - provisional, unaccompanied driver [1955] 713
    - visitors, for [1957] 629
  - driving tests [1955] 4
  - driving under age [1958] 56
  - driving uninsured [1954] 472, 473
    - aiding and abetting [1954] 711
    - bicycle [1955] 714
    - car park, in [1958] 817
    - conditional discharge [1954] 941
    - indorsement [1955] 383
    - insurance company on risk [1954] 473
    - servant driving [1955] 384
    - social, etc., purposes [1954] 942
  - driving without licence [1955] 320
  - drugs [1957] 256
  - drunk in charge of vehicle [1954] 62; [1955] 566; [1958] 619
    - accessory [1955] 183

Road Traffic—*cont.*
- another driver [1955] 652
- control of vehicle [1954] 627; [1956] 59
- dangerous driving [1954] 940
- defence of [1955] 349–58
- defences to [1956] 146
- evidence [1956] 184
- " in charge of " [1956] 291
- jury direction [1954] 940; [1955] 793
- law or fact [1956] 75
- runaway car [1955] 436
- starting car [1956] 340
- tests of drunkenness [1954] 443–7

dual purpose vehicle [1957] 193
epileptic fits [1958] 550
- debarring from licence [1958] 691

error of judgment [1959] 635
evidence [1956] 192; [1959] 715
excise duty [1954] 942; [1956] 65, 707; [1957] 416, 486
excise licence [1960] 562, 647
exemptions [1957] 415
exhaust fumes [1955] 271
failure to report accident [1955] 317, 382, 712
fine on the spot [1960] 14
foreign drivers [1959] 42
forensic science [1955] 282–9
goods vehicles [1955] 252; [1956] 206; [1957] 257, 279; [1959] 458
haulage charges [1954] 314
helmets [1958] 703
highway, definition of [1959] 328
hindering free passage [1957] 818; [1958] 398
hire charges [1954] 314
horns [1955] 732
index marks [1956] 65
insurance [1956] 206, 423, 569, 632, 776; [1957] 194, 350; [1959] 151; [1960] 63, 563
international circulation [1955] 513; [1957] 630
juvenile offender [1956] 491
legislation [1960] 591
licence endorsement [1957] (p.p.) 69
licences [1957] 132; [1960] 67, 576, 774
licensing [1954] 151; [1956] 65; [1957] 416, 486
lights, [1954] 158, 490, 873, 876; [1955] 135, 203, 656; [1956] 212, 220, 501; [1957] 132, 699; [1958] 218–221, 267, 489, 559; [1960] 66
- new rules [1954] 767–770

local authority prosecution [1956] 492
loitering [1959] 853
markings [1955] 43
mascot [1957] 562
medical examination [1958] 262
motor cycles [1957] 338; [1959] 151
motor-scooter brakes [1957] 709
motorway [1959] 148
moving forward or reversing [1959] 494
mudguards [1955] 203
notice of intended prosecution [1954] 796; [1955] 107; [1956] 58, 342, 698; [1958] 398, 814, 816; [1959] 460, 854; [1960] (p.p.) 285, 429, 564, 565
number plates [1954] 158
obstruction [1956] 276; [1957] 478, 500; [1958] 263; [1959] 855
overloaded vehicles [1954] 75
overtaking [1958] 129; [1959] 634
parking [1956] 5; [1957] 6–12, 78; [1959] 668; [1960] 142, 593, 595, 717, 781
parking meters [1957] 486
pedal cycle brakes [1954] 729

Road Traffic—*cont.*

pedestrian crossings [1954] 394, 484, 492; [1955] 523, 787; [1958] 339; [1959] 856; [1960] 221, 710
pedestrians [1955] 61
plying for hire [1957] 194; [1959] 464
police and [1956] 487
police motor-cyclist [1959] 786
powers on appeal [1958] 111
previous convictions [1955] 215
private roads [1956] 292
prohibition of waiting [1955] 509
provisional licence [1958] 267; [1960] 196
public place [1956] 147
public service vehicle,
- boarding between stops [1954] 869
- carrying capacity [1955] 54
- fitness [1955] 129
- licences [1957] 263
- passengers standing [1956] 493
- safety of passenger [1954] 474
- special occasion [1954] 628
- travel concessions [1955] 446

radar [1957] 499, 564
registration [1954] 151; [1956] 65; [1957] 417; [1959] 357
registration book [1954] 604–10
registration marks [1954] 151
regulation, procedure [1958] 62
removal of vehicles [1957] 416
reversing lights [1954] 71
" road " [1957] 195, 479
road, meaning of [1955] 321, 715; [1958] 817; [1959] 326
safer driving [1955] 338, 460; [1960] 381
school crossings [1954] 562, 943; [1955] 64
sentence, matters for consideration [1955] 755–63
signals, driver's duty as to [1959] 493
" special circumstances " [1954] 795, 816
special occasions [1954] 159, 628
special roads [1958] 703; [1959] 667, 738, 739
special types [1956] 708; [1958] 490, (p.p.) 269
speed limit [1954] 159, 730; [1956] 137, 570; [1957] 338; [1959] 738, 795
- radar [1957] 499, 564

speeding [1957] 499; [1958] 477; [1959] 459, 853
stage carriage [1954] 629
statistics [1956] 4, 790; [1957] 77
street playgrounds [1955] 584
summary justice [1955] 564, 642, 705, 770; [1956] 45, 116, 188, 254, 325, 409, 478, 546, 617, 696, 770, 826; [1957] 45, 110, 181, 241, 320, 401, 464, 604, 681, 751, 801; [1958] 84, 184, 251, 326, 541, 616, 752; [1959] 282, 357
summons [1954] 939
summons headings [1956] 739–40; [1957] 13–14, 163–170
taking vehicle (p.p.) [1957] 419; [1958] 480, 694, (p.p.) 828; [1959] 589; [1960] 197, 199, (p.p.) 578, 711
tests [1960] 647
ticket fines [1960] 296, 717
time limit on prosecution [1958] 50
track laying vehicles [1954] 152, 730; [1955] 583
tractor [1959] 131
traffic lights [1956] 207; [1959] 495
traffic sign [1955] 322; [1956] 493, 657; [1957] 264, 337; [1958] 137, 138; [1959] 536; [1960] 646, 719
- police signal and [1955] 787

trailer, meaning of [1958] 478; [1959] (p.p.) 669

- Road Traffic—*cont.*
  - transport levy [1954] 152
  - turning with insufficient notice [1958] 817
  - unattended vehicle [1956] 341
  - used, meaning of [1958] 274; [1960] 63
  - vehicle log book, forgery of [1954] 604–10
  - vehicles,
    - authorisation of [1959] 369, 739
    - kept on roads [1959] 311
  - vehicles, special types [1955] 584; [1960] 283, 783
  - wardens [1960] 296, 717
  - white lines [1958] 4
- Road Traffic Act, 1930,
  - offences under sections 11 and 12, [1959] 257–262, 325–330, 491–496, 634–639, 671, 715–720
- Road Traffic Act, 1956...[1956] 608–11, 673–9, 758–66, 778, 788; [1957] 132, 202, 264, 699
- Road Traffic Act, 1960 [1960] 444, 591
- Road Traffic Amendment Act, 1960 [1960] 592
- Road Traffic and Roads Improvement Act, 1960 [1960] 592, 717
- Road Transport Lighting Act, 1957 [1957] 699; [1958] 218–221; [1959] 538
- Robbery,
  - drunkenness [1954] 870
  - intent [1954] 870
  - mail bag, sentence [1954] 386
- Royal Irish Constabulary (Widows' Pensions) Act, 1954 [1954] 394
- Royal Prerogative [1956] 371
- Russia [1956] 789; [1957] 215

- Sale [1957] 181, 401, 464
- Saliva,
  - detection by [1958] 3
- Salmon and Freshwater Fisheries,
  - Avon and Dorset [1955] 513
  - Conon [1955] 720
  - Cornwall [1955] 326
  - Dee & Clwyd [1955] 513
  - Devon [1954] 562; [1956] 66
  - Essex [1954] 877
  - fixed engine [1954] 308
  - joint enterprise [1957] 624
  - Hampshire [1954] 949
  - Hertfordshire [1955] 797
  - Lancashire [1954] 805; [1957] 338
  - Northumberland and Tyneside [1957] 757
  - pollution [1957] 196
  - sale of [1957] 197
  - Somerset [1955] 54
  - Wye, [1957] 417
- Samoa, Western,
  - murder in [1959] 697
- Sausages, deficiency of meat [1954] 543
- School attendance [1954] 299; [1956] 148; [1960] 363
- Scotland,
  - adoption agencies [1959] 536
  - agriculture [1955] 54; [1960] 501, 577
  - allowances [1960] 280
  - animals [1954] 634, 635, 638, 798; [1955] 54, 257, 720; [1956] 212; [1957] 259; [1958] 264; [1959] 149, 799
  - appeals [1959] 474
  - approved schools [1954] 395; [1955] 327; [1956] 356
  - betting [1954] 637; [1960] 838, 852
  - birds [1954] 638; [1955] 394, 513; [1956] 66, 357; [1958] 265
  - cases [1954] 575
- Scotland—*cont.*
  - children [1956] 348
    - boarding-out [1959] 537
    - homes [1959] 537
  - clean air [1957] 415; [1959] 68
  - condensed milk [1959] 668
  - contempt of court [1960] 265
  - corn returns [1954] 646
  - corroboration [1959] 193
  - Court of Session fees [1959] 474
  - Criminal Justice (Scotland) Act, 1949 [1957] 700
  - crofters [1955] 449
  - cycle racing [1960] 283
  - deer [1959] 537
  - defence regs. [1954] 641
  - detention centre [1960] 577
  - education [1957] 67, 122, 262
  - firearms [1955] 197
  - food and drugs [1954] 877; [1955] 394; [1956] 357, 502, 649, 709; [1957] 200, 626; [1958] 764; [1959] 472, 473, 602, 669; [1960] 222, 369
  - friendly societies [1954] 644
  - harbours [1956] 709
  - Homicide Act, 1957, in [1957] 500
  - housing [1954] 805
  - importation of plants [1958] 704
  - juries [1954] 644; [1955] 124
  - justices [1955] 94
  - juvenile courts [1955] 451
  - known thief [1960] 269
  - licensing [1959] 799; [1960] 268
  - limitation of actions [1954] 644
  - magistrates [1954] 875
  - marriage [1956] 709
  - milk [1959] 224
  - murder trials [1955] 98
  - pensions [1957] 201
  - pest control [1954] 481, 563; [1955] 54, 327; [1956] 433; [1957] 129, 336; [1960] 282
  - police [1954] 226, 393, 480, 914–6; [1955] 128, 327, 394, 451, 584; [1956] 138, 282, 357, 707, 780; [1957] 130, 336, 485, 826; [1959] 150; [1960] 377, 501, 783
  - poliomyelitis, notification of [1958] 704
  - precognitions [1959] 194
  - prisons [1954] 226, 395; [1955] 96, 657; [1956] 443, 502
  - private prosecution [1959] 808
  - probation [1954] 563; [1955] 327; [1956] 503, 649; [1959] 602, 798; [1960] 377
  - prosecutions [1956] 104–10
  - public health [1954] 647; [1957] 131
  - rivers [1955] 451; [1960] 648
  - road traffic [1957] 415; [1958] 138; [1960] 719
  - salmon fisheries [1955] 720; [1960] 577
  - sea fisheries [1955] 259; [1956] 503; [1960] 577
  - sentence, appeals against [1959] 191
  - Sheriff Courts [1959] 870
  - slaughterhouses [1954] 642
  - speed traps [1959] 196
  - spring traps [1959] 68
  - statistics [1955] 403; [1956] 443; [1957] 426
  - survey [1954] 500–10; [1956] 104–10
  - theatres, etc. [1955] 585
  - tuberculosis [1959] 799
  - visiting forces [1954] 647
- Scots law,
  - admissibility of statement [1958] 753
  - breach of the peace [1959] 438, 465
  - corroboration of accomplices in [1958] 476
  - evidence [1960] 566, 634
  - indictment [1960] 201

Scots law—*cont.*
  larceny [1959] 465
  libel, relevance of [1959] 787
  motor-vehicles [1959] 787
  receiving in [1958] 476
  trial [1960] 635
Scottish Newsletter, A [1958] 368–373; [1959] 188–197; [1960] 250–256
Sea and seashore, pollution [1955] 447; [1956] 575
Sea Fisheries,
  district [1955] 197
  fishing nets [1954] 226; [1956] 434, 709
  grey seals [1959] 69; [1960] 222
  registration [1959] 669
  Scotland [1955] 259; [1956] 503
  whaling [1955] 129, 584
  whiting [1954] 563
Seamen,
  Canadian [1954] 227
  canteens [1954] 313
  foreign deserters [1954] 153, 315
  Ireland [1954] 563
  Mexico [1955] 328
Search,
  illegal [1955] 343
  powers of [1960] 598, 603
Security cases [1959] 333
Sedition [1955] 116
Seduction by women [1956] 446–56, 529–42, 798–9
Seeds [1954] 646; [1959] 384
Self-defence,
  homicide [1958] 583–590; [1960] 468–477
  onus of proof [1957] 323, 325; [1959] 567
  provocation and [1954] 621
Self-incrimination [1954] 916–20
Sentence,
  absence of prisoner [1958] 334
  appeal [1954] 870; [1958] 111; [1959] 788
  attempted suicide, for [1956] 129
  Borstal [1954] 63
    offence committed on licence [1955] 789
    report as to suitability [1958] 820
    variation of sentence [1954] 474; [1960] 277, 573, 640
  capital punishment [1954] 4
  collective punishment [1955] 463
  committal for [1958] 173, 818, 820; [1959] 581
  conditional discharge [1955] 118, 246; [1958] 486; [1960] 441
  company director [1954] 221
  consecutive and concurrent [1958] 174
  corporal punishment [1954] 4
  corrective training. *See* Corrective training.
  dangerous driving [1957] 709
  detention centres, to [1954] 755–9
  disparity [1956] 127
  fines [1954] 65, 688; [1960] 215
  firearm, possession of [1954] 723
  forgery [1956] 60
  form of words [1958] 332
  fraudulent conversion [1956] 839
  gross indecency [1954] 553
  immoral earnings, living on [1960] 725
  imprisonment [1954] 65; [1957] 155, 536; [1959] 61, 138, 219, 299, 373, 468, 529, 663, 737, 865; [1960] 66, 139, 215, 275, 371, 439, 571, 640, 713, 714, 844
    alteration of charge [1954] 222
    alternative to [1955] 462; [1957] 561
    corrective training after [1954] 64, 629
    Court of Criminal Appeal, by [1958] 242, 313, 482, 553, 625, 758

Sentence—*cont.*
  imprisonment—*cont.*
    default in paying balance of fine [1954] 129
    fine, and [1955] 253
    infant [1955] 111, 311, 521
    larceny as a servant [1956] 839
    life [1955] 386
    offenders under twenty-one [1958] 383
    preventive detention, from [1954] 222
    reduction [1956] 494; [1958] 679
    remission, consideration of [1956] 425
    short sentences [1955] 523
    youth guilty of violence [1954] 223
  in absentia [1957] 480
  indecent assault [1954] 381, 944
  indeterminate [1954] 337
  jurisdiction to [1960] 568
  maximum [1954] 673
  nature of [1958] 174–180
  night poaching [1959] 858
  no cell available [1957] 638
  notice of previous convictions [1960] 61, 202
  one act, two offences [1959] 590
  option to prisoner [1959] 370
  passing of [1958] 172
  persistent offender [1954] 889–98
  post office frauds [1954] 489
  postman for theft [1955] 323
  postponed [1957] 61, 316; [1958] 173; [1959] 391
  practice and procedure [1959] 437, 581
  previous convictions [1955] 175; [1956] 840; [1957] 46, 60, 206, 407
  preventive detention. *See* Preventive detention.
  principles of [1954] 870; [1957] 141, 155–159, 455–459, 536–539
  prison rules, breach of [1960] 433
  probation [1954] 146; [1960] 65, 140, 277, 374
    breach of [1954] 289, 368; [1960] 202, 271
    orders, two [1960] 498
    use of [1954] 340
  probationer, of [1955] 242
  punishment and treatment since 1948 [1954] 686–94
  quarter sessions, by [1954] 44; [1960] 271, 568
  quashed [1959] 860
  rape [1955] 193, 578
  remission of [1954] 146; [1959] 860
  road traffic offences [1954] 386
  robbery [1954] 386
  shaving head [1957] 500
  substitution on appeal [1956] 701; [1957] 206, 270
  supervision order [1960] 204
  suitable treatment [1958] 2
  taking into consideration [1958] 333; [1960] 356
  technical irregularity in [1958] 474
  unaltered where a count quashed on appeal [1958] 687
  unlawful wounding [1956] 426
  wrongly recorded by court [1959] 3
Sexual offences,
  attempted rape [1959] 209
  children, against [1960] 204, 266, 422, 641, 643
  gross indecency,
    attempt [1959] 134, 215, 448
  incest [1960] 267
  indecent assault [1958] 481; [1959] 122, 285, 861; [1960] 422
  indictment [1959] 215
  mental defective [1960] 201

- Sexual offences—*cont.*
  - rape,
    - consent to [1959] 450; [1960] 843
    - corroboration [1960] 422
  - sodomy, murder and [1959] 453
  - soliciting [1959] 119, 276
  - statements from victims [1960] 86
  - unlawful sexual intercourse, meaning of [1958] 623; [1959] 508
- Sexual Offences Act, 1956 [1956] 709, 798–799; [1960] 704
- Shopbreaking [1956] 129, 210; [1960] 426, 641, 714
- Shoplifting [1956] 721, 725–30
- **Shops,**
  - closing [1959] 296; [1960] 205
  - Jewish [1955] 789
  - meaning of [1958] 372
  - mobile [1958] 621
  - street trader [1959] 466
  - summary justice [1957] 320, 681; [1958] 468
  - Sunday trading [1954] 554, 555; [1956] 344, 426; [1958] 621; [1959] 59, 216, 861
- **Sierra Leone [1957] 121, 261**
- Slaughter of Animals Act, 1958...[1959] 142
- **Slaughter of Animals (Amendment) Act, 1954 [1954] 798**
- Slaughterhouse Act, 1958...[1958] 698; [1959] 303
- **Slaughterhouses [1955] 185, 310, 376**
- **Slaughterhouses Act, 1954 [1954] 642**
- Slot machines, larceny from [1956] 74
- Small Lotteries and Gaming Act, 1956 [1956] 639
- Small Lotteries and Gaming Act, 1956 (Amendment) Act, 1959...[1959] 533
- Soliciting [1955] 63; [1958] 776; [1959] 276–279
  - summary justice [1959] 119
- **Solicitors,**
  - **conviction, effect of [1955] 790; [1956] 60**
  - **drafting by persons other than [1958] 681**
  - **fees [1954] 223**
  - **misconduct [1956] 841**
- **Solicitors Act, 1957 [1957] 550**
- Solicitors (Amendment) Act, 1956 [1956] 503
- Solicitors (Scotland) Act, 1958 [1958] 634
- Spain [1956] 658
- **Spring gun,**
  - **setting of [1954] 625**
- Statement, Previous Inconsistent [1958] 169–171
- Statistics [1954] 406, 738; [1955] 403, 731; [1956] 789; [1957] 216, 425; [1958] 3; [1960] 657, 678
  - murder [1957] 501
  - Scotland [1957] 426; [1960] 250, 587
- Statutory declarations,
  - parcels, preparation of [1958] 471
- **Statutory Instruments,**
  - **validity of [1954] 377**
- Statutory offence, date of Act [1957] 544
- **Sterilisation [1954] 785**
- Strategic goods [1957] 332, 694
- Street Offences Act, 1959...[1959] 739; [1960] 521, 704
  - criticism of [1959] 681
- Street Offences Bill [1959] 159, 231
  - Scottish comparison, a [1959] 322
  - viewpoint on,
    - lawyer's [1959] 204
    - police [1959] 205
- Street trading [1957] 252, 253; [1959] 527, 789
- Strikes, picketing [1957] 565
- Sugar Act [1956] 640, 848
- **Summary Jurisdiction (Scotland) Act, 1954 [1954] 805**
- Suicide [1955] 771
  - attempted [1956] 129, 254; [1957] 78, 188; [1958] 368, 420
  - crime, as a [1958] 143
  - verdict of [1956] 410, 482, 486
- Summary justice [1955] 521, 563, 639, 702; [1956] 42, 113, 186, 252, 323, 406, 476, 544, 615, 695, 769; [1957] 45, 109, 179, 240, 318, 399, 463, 539, 680, 750, 801; [1958] 40, 126, 184, 250, 326, 383, 467, 541, 616, 680, 752, 802; [1959] 44, 119, 208, 282, 357
- Summary trial,
  - application for, implied in certain cases [1958] 694
  - power to commit for trial [1958] 131
- **Summing up,**
  - **evidence of accomplice, as to [1954] 326**
  - failure to put defence [1954] 147; [1959] 297
  - further direction [1958] 551
  - **jury's disagreement, as to [1954] 139**
  - misdirection [1958] 131
  - **obscene libel [1954] 593–7**
  - **separation of jury [1954] 51**
- Summons headings,
  - parking [1956] 13–14
  - road traffic [1956] 739–40; [1957] 163–170
- **Sunday,**
  - **entertainment [1955] 255**
  - observance [1956] 427
  - trading [1954] 554, 555; [1956] 344, 426
  - **warrant, execution of [1954] 556**
- Supervision order [1955] 194, 387; [1957] 407, 455; [1958] 710; [1960] 204
- Suspect documents [1958] 644
- Suspected person [1958] 115, (p.p.) 197
- **Swaziland [1954] 945**

- Taking and driving away,
  - summary trial of [1958] 694
- Taking other offences into consideration [1959] 18–26, 108–117, 197–203
- Tanganyika [1958] 59
  - conspiracy [1957] 185
- Tax prosecutions [1956] 2, 290, 333
- Taxicabs, plying for hire [1958] 616
- Telegraphs [1957] 487
- **Telegraphy,**
  - **telex [1954] 949**
- Telephones [1956] 479
  - improper calls [1958] 384
  - intercepting calls [1957] 425, 502–510
  - tapping [1958] 106; [1960] 1, 383
- **Territorial Army [1954] 68**
- Testimony, Proposals to Improve Perpetuation of [1959] 313–316
- **Textile fibres [1954] 836–40**
- Thames Court, history [1956] 90–100, 680–87, 807–14
- Theatres,
  - **unauthorised additions [1954] 944**
- Therapeutic abortion [1958] 600–613
- Therapeutic substances [1955] 125; [1956] 353, 644; [1957] 413; [1959] 534
- Therapeutic Substances Act 1956 [1956] 353
- Thermal Insulation (Industrial Buildings) Act, 1957...[1957] 694
- This and That [1954] 29–30, 105–6, 197–8
- Threatening letters [1956] 633
- Thurso Inquiry, The [1959] 229
- Ticket fines [1960] 717
- **Town and Country Planning,**
  - advertisement posting [1955] 388, 791

- Town and Country Planning—*cont.*
  - enforcement notice, contravention of [1959] 467
  - summary justice [1956] 547
- **Towpath murder [1954] 179–88**
- **Trade and Industry,**
  - control [1956] 63
  - iron and steel, functions as to [1957] 202
  - production census [1954] 950; [1955] 798; [1956] 849
  - restrictive practices [1956] 710. 849
  - summary justice [1955] 563, 642; [1956] 117, 189; [1958] 384
  - **transfer of functions [1955] 514**
- Trading Representations (Disabled Persons) Act, 1958 [1958] 704
- Traffic wardens [1959] 160; [1960] 717, 726
  - suggested organisation of [1959] 186–187
- Transport [1958] 560
  - civil defence [1954] 389
- **Transport Charges, etc. (Miscellaneous Provisions) Act, 1954 [1955] 53**
- **Treason [1955] 271**
- Trespass,
  - summary justice [1955] 563, 642
- **Trial,**
  - adjournment refused [1960] 636
  - advance notice of defence [1959] 548–554
  - allocutus, omission of [1960] 434
  - arraignment [1957] 539
  - committals for [1955] 479–483; [1956] 67; [1958] 43, 400; [1960] 207
  - **conspiracy [1954] 310**
  - **counsel's conduct [1955] 437**
  - counsel's speeches [1957] 750
  - **defence, failure to plead [1954] 723**
  - deposition, absence of witness [1959] 593
  - **direction to jury on burden of proof [1955] 464–74**
  - direction to acquit [1959] 862
  - election [1959] 863; [1960] 206
  - **exclusion of prisoner [1954] 278**
  - expediting [1959] 77, 78, 82–95, 269–275
  - fitness to plead [1957] 605, 821; [1959] 847
  - indictment, duplicity in [1960] 569
  - interruptions by chairman [1960] 436
  - joint [1956] 842, 843; [1957] 198
  - joint indictments [1955] 792; [1956] 345
  - **judge's questions [1955] 389**
  - jury,
    - communications to [1960] 638
    - direction to [1959] 791, 862
    - plea in presence of [1959] 136
    - summing up to [1960] 211, 273, 491, 777
    - threat to [1960] 210
  - jury, by [1958] 418
  - larceny [1954] 475; [1956] 199
  - minor offences [1954] 292, 709, 814; [1957] 142, 547, 671–680
  - misdirection [1959] 528, 864
  - **new, prejudicial evidence [1954] 871**
  - newspaper, by [1958] 569
  - persons awaiting [1959] 805
  - Peter Manuel, of [1958] 654–661
  - place of [1957] 118
  - **plea,**
    - change of [1955] 44; [1957] 317
    - guilty " with explanation " [1958] 400
  - **several counts, to [1954] 790**
    - **withdrawal of [1954] 631**
  - prejudice [1958] 54
- Trial—*cont.*
  - pre-trial publicity [1954] 506; [1956] 801
  - previous convictions,
    - jury's knowledge [1957] 822
  - list of [1960] 437
  - public, power to exclude [1960] 488
  - receiving [1954] 475; [1956] 57
  - separate [1954] 141, 310; [1957] 42
  - separate indictments [1958] 261
  - speedy, provision for [1959] 310
  - summing up [1955] 323, 433, 435, 793, 794, 795, 796; [1956] 346; [1958] 551; [1959] 297, 850
  - venue, change of [1958] 54
  - verdict [1955] 120, 716; [1956] 54; [1958] 132, 334; [1959] 662; [1960] 435, 843
  - view [1957] 541; [1958] 63
  - **withdrawal of case from jury [1955] 646**
  - withdrawal of consent to summary [1957] 601, 625
  - witnesses, calling of [1959] 603
- Trucial States [1956] 277
- **Truth drug [1954] 423–34, 482; [1955] 7**
- Tucker Report, The [1959] 3, 82–95
- Turkey [1956] 657
- **Typewriting [1954] 598–603**

- Uganda [1958] 61
- U.N. Congress [1957] 78; [1959] 684; [1960] 586, 742
- **Unavoidable crime [1955] 295**
- Unlawful,
  - assembly [1959] 504
  - drilling [1959] 505
  - gaming [1959] 164, 167
  - oaths [1959] 505
  - possession [1960] 598
  - sexual intercourse [1959] 508
- " Unlawful," application and meaning of,
  - civil cases, in [1959] 503
  - criminal law, in [1959] 504
- Unlawful chastisement [1958] 690
- Unlawful sexual intercourse, meaning of [1958] 623
- Unlawful wounding [1957] 258
- U.S.A.,
  - civilians abroad [1957] 501
  - concept of crime [1959] 239–249, 331–339
  - **courts-martial [1954] 75**
  - **juvenile delinquency [1955] 401**
  - letter from [1955] 420–6
  - narcotics in [1956] 316–19
  - police [1955] 401
  - shaving heads [1957] 500

- **Vagrancy,**
  - **area, meaning of [1954] 387**
  - consorting with criminals [1956] 77
  - **control of intending criminals [1955] 70, 136–47**
  - **fortune telling [1955] 255**
  - **found on premises [1954] 387**
  - **frequenting [1955] 716**
  - indecent exposure [1956] 496
  - information [1960] (p.p.) 580
  - **living on prostitution earnings [1954] 147**
  - loitering [1956] 572
  - rogue and vagabond [1956] (p.p.) 651
  - summary justice [1956] 46, 479; [1957] 46, 242, 320, 401, 464
  - suspected person [1958] 115, (p.p.) 197
- Vehicles kept on roads [1959] 311
- Vehicles stationary in traffic [1958] 501
- Verdict. *See* Trial.
- **Vicarious liability [1955] 42, 121, 296**
- Victoria Tower Gardens [1956] 645

Virgin Islands [1957] 825
Visiting forces [1954] 558, 647, 799

Wagering,
  fraud in [1959] 289
  gaming and [1958] 685
Wardens, traffic [1959] 160; [1960] 717, 782
  suggested organisation of [1959] 186–187
Warrant,
  arrest, for [1958] 247–250
  bail, backed for [1959] 705
  bastardy arrears [1954] 131
  bench [1959] 48, 521
  indorsement of [1957] 823
  means inquiry [1954] 128
  search,
    execution of, on Sunday [1954] 556
Weeds Act, 1959...[1959] 791
Weights and Measures,
  actual offender [1957] 544
  bread [1955] 309
  deficiency [1959] 371
  false scales [1954] 872
  false trade description [1960] 438
  food [1956] 711
  limits of error [1958] 490
  local standards [1958] 490
  measuring liquid fuel [1958] 560
  summary justice [1956] 117, 189, 771; [1958] 384
Welsh courts [1959] 799
West Africa [1956] 132; [1957] 330
West Riding JJ. Accounts, 1829–1830 [1957] 529–536
Western Samoa, murder in [1959] 697
Wife,
  evidence after nullity decree [1954] 92–95, 135
Wireless Telegraphy,
  aircraft [1954] 481, 563, 564
  interference [1955] 260; [1957] 339
  licences [1954] 481; [1957] 418, 551
  ships [1954] 481, 563, 564
Wireless Telegraphy—*cont.*
  summary justice [1955] 563; [1957] 46
  unlicensed set [1955] 716
Wire tapping [1957] 425, 502–510
Witchcraft, Homicide and the Supernatural,
  A Colonial Viewpoint on [1958] 661–675
Witnesses,
  allowances [1955] 129; [1956] 62, 66; [1958] 827; [1960] 284, 377
  attendance of [1956] 843
  binding over [1956] 475; [1959] 819–821
  hostile [1954] 55; [1957] 51
  interrogation [1957] 701, 829
  justices' powers [1956] (p.p.) 578
  juvenile [1956] 250
  London [1957] 334
  previous statement [1958] 133
  prosecution, calling of, for defence [1956] (p.p.) 436
  prosecution's duty as to [1956] 823; [1958] 544; [1959] (p.p.) 603
  rebutting evidence [1958] 57
  recall of [1956] 346
  statements, contradiction of [1960] (p.p.) 503
  subpoena [1956] 130, 294
  summary trials, at [1954] 73, 161, 227, 292, 316, 483
Wolfenden Report, The, in Parliament [1959] 38–41
Workmen's Compensation and Benefit (Supplementation) Act, 1956 [1956] 644
Wounding [1954] 672; [1956] 426; [1959] 505
Wounding with Intent, the Problem of [1958] 675–678; [1959] 286
Writing ink [1957] 145–155

Young Offenders [1959] 183
  treatment of [1959] 312, 746
Young Persons. *See* Children and Young Persons.

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Calendar

WINTER ASSIZES, 1960

First Working Days

South Eastern Circuit (Cassels and Byrne JJ.)

March
8: Kingston
15: Maidstone
29: Lewes

Wales and Chester Circuit (Barry, Havers and Phillimore JJ.)

March
1: Lampeter
4: Haverfordwest
9: Carmarthen
17: Cardiff

Western Circuit (Hilbery, Finnemore and Sachs JJ.)

March
8: Winchester

Northern Circuit (Wallington, Diplock, Paull and Winn JJ.)

March
8: Manchester

Oxford Circuit (Devlin and Davies JJ.)

March
1: Stafford
15: Birmingham

Midland Circuit (Stable, Jones and Marshall JJ.)

March

8: Warwick
15: Birmingham

North Eastern Circuit (Donovan, Salmon, Stevenson and Edmund Davies JJ.)

March

8: Leeds

CENTRAL CRIMINAL COURT, 1960

First Working Days

March 1, 29 April 26

COUNTY QUARTER SESSIONS

	March
Anglesey	15
Cheshire (Knutsford)	29
Cumberland	29
Essex	9
Essex (Appeals)	29
Gloucestershire	16
Hampshire	28
Kent, East	28
Kent, East (Appeals)	11
Kent, West (Appeals)	21, 22
Leicestershire	15

	March
Lincolnshire (Holland: Spalding)	31
Lincolnshire (Lindsey: Lincoln)	17
Northamptonshire	10
Oxfordshire	29
Oxfordshire (Appeals)	22
Somerset	30
Wiltshire (Salisbury)	30
Warwickshire	29
Worcestershire	30
Yorkshire, East Riding	15
Yorkshire, West Riding	7

	April
Bedfordshire	11
Berkshire	4
Buckinghamshire	4
Caernarvonshire	14
Cambridgeshire	1
Cardigan	7
Carmarthenshire	8
Cheshire (Chester)	4
Denbighshire (Denbigh)	1
Derbyshire	6
Devonshire	5
Dorset	6
Essex	6
Essex (Appeals)	26
Flintshire	7
Glamorganshire	5
Herefordshire	4
Hertfordshire (St. Albans)	4
Hertfordshire (St. Albans) (Appeals)	5
Huntingdonshire	5

	April
Isle of Ely (Ely)	6
Isle of Wight	6
Kent, East (Appeals)	22
Kent, West	4
Kent, West (Appeals)	19, 20
Lincolnshire (Kesteven: Sleaford)	7
Merioneth (Bala)	12
Monmouthshire	6
Montgomeryshire (Newtown)	7
Norfolk (King's Lynn)	27
Norfolk (Norwich)	13
Nottinghamshire (Nottingham)	4
Oxfordshire (Appeals)	26
Peterborough, Soke of	14
Rutland	12
Shropshire	13
Suffolk, West	5
Sussex, West	7
Westmorland	1

BOROUGH QUARTER SESSIONS

	March		March
Abingdon	9	Shrewsbury	22
Burnley	4	Southend-on-Sea	14
Canterbury	17	Walsall	10
Newark	30, 31	West Bromwich	24

	April		April
Bridgwater	21	Maidstone	25
Bristol	11	Margate	22
Cardiff	20	Plymouth	12
Croydon	7	Poole	4
Deal	22	Reading	6
Dover	21	Rochester	22
Folkestone	9	Sunderland	5
Grantham	8	Swansea	27
Gravesend	7	Worcester	1

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Calendar

WINTER ASSIZES, 1960

First Working Days

South Eastern Circuit (Cassels and Byrne JJ.)

February
2: Ipswich
9: Norwich
23: Chelmsford

March
8: Kingston
15: Maidstone
29: Lewes

Wales and Chester Circuit (Barry, Havers and Phillimore JJ.)

February
4: Mold
9: Chester
23: Presteign
25: Brecon

March
1: Lampeter
4: Haverfordwest
9: Carmarthen
17: Cardiff

Western Circuit (Hilbery, Finnemore and Sachs JJ.)

February
2: Bodmin
9: Exeter
23: Bristol

March
8: Winchester

Northern Circuit (Wallington, Diplock, Paull and Winn JJ.)

February
9: Liverpool

March
8: Manchester

Oxford Circuit (Devlin and Davies JJ.)

February	*March*
2: Gloucester	1: Stafford
9: Newport	15: Birmingham
16: Hereford	
23: Shrewsbury	

Midland Circuit (Stable, Jones and Marshall JJ.)

February	*March*
3: Oakham	8: Warwick
4: Lincoln	15: Birmingham
16: Derby	
23: Nottingham	

North Eastern Circuit (Donovan, Salmon, Stevenson and Edmund Davies JJ.)

February	*March*
9: York	8: Leeds
23: Sheffield	

CENTRAL CRIMINAL COURT, 1960

First Working Days

February 2	March 1, 29

COUNTY QUARTER SESSIONS

	February		February
Devonshire	23	Kent, East	8
Essex	3	Kent, West	22
Essex (Appeals)	25	Kent, West (Appeals)	15, 16
Hertfordshire (Hertford)	23	Nottinghamshire (East Retford)	8
Hertfordshire (St. Albans)	8	Oxfordshire (Appeals)	23
Hertfordshire (St. Albans) (Appeals)	9		

	March		March
Anglesey	15	Lincolnshire (Holland: Spalding)	31
Cheshire (Knutsford)	29	Lincolnshire (Lindsey: Lincoln)	17
Cumberland	29	Northamptonshire	10
Essex	2	Oxfordshire	29
Essex (Appeals)	29	Oxfordshire (Appeals)	22
Gloucestershire	16	Somerset	30
Hampshire	28	Wiltshire (Salisbury)	30
Kent, East	28	Warwickshire	29
Kent, East (Appeals)	11	Worcestershire	30
Kent, West (Appeals)	21, 22	Yorkshire, East Riding	15
Leicestershire	15	Yorkshire, West Riding	7

BOROUGH QUARTER SESSIONS

	February		February
Andover	9	Oxford	12
Cambridge	19	Devizes	26
Croydon	25	Dudley	22

	March		March
Canterbury	17	Southend-on-Sea	14

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SPRING ASSIZES, 1960

First Working Days

orth-Eastern Circuit (Cassels, Wallington, Slade, Sachs and Winn JJ.)

	April
Leeds	19

orthern Circuit (Davies, Edmund Davies and Lloyd-Jones JJ.)

	April
Liverpool	4
Manchester	25

CENTRAL CRIMINAL COURT

First Working Days

April 26 May 17

County Quarter Sessions

	April
Bedfordshire	11
Berkshire	4
Buckinghamshire	4
Caernarvonshire	14
Cambridgeshire	1
Cardigan	7
Carmarthenshire	8
Cheshire (Chester)	4
Cornwall (Bodmin)	20
Denbighshire (Denbigh)	1
Derbyshire	6
Devonshire	5
Dorset	6
Essex	6
Essex (Appeals)	26
Flintshire	7
Glamorganshire	5
Herefordshire	4
Hertfordshire (St. Albans)	4
Hertfordshire (St. Albans) (Appeals)	5
Huntingdonshire	5

	Apri
Isle of Ely (Ely)	6
Isle of Wight	6
Kent, East (Appeals)	22
Kent, West	4
Kent, West (Appeals)	19, 20
Lincolnshire (Kesteven: Sleaford)	7
Merioneth (Bala)	12
Monmouthshire	6
Montgomeryshire (Newtown)	7
Norfolk (King's Lynn)	27
Norfolk (Norwich)	13
Nottinghamshire (Nottingham)	4
Oxfordshire (Appeals)	26
Peterborough, Soke of	14
Rutland	12
Shropshire	13
Suffolk, East	1
Suffolk, West	5
Sussex, West	7
Westmorland	1

	May
Devonshire	17
Essex	4, 31
Essex (Appeals)	24
Hertfordshire (Hertford)	23
Hertfordshire (Hertford) (Appeals)	24
Kent, East	9

	May
Kent, West	23
Kent, West (Appeals)	16, 17
Lincolnshire (Lindsey: Lincoln)	10
Nottinghamshire (Newark)	9
Oxfordshire (Appeals)	31
Sussex, West	12

Borough Quarter Sessions

	April
Birkenhead	11
Blackburn	5
Bridgwater	21
Bristol	11
Cardiff	20
Croydon	7
Deal	22
Derby	11
Dover	21
Folkestone	9
Grantham	8
Gravesend	7
Halifax	7
Ipswich	7
Lincoln	14

	April
Maidstone	25
Margate	22
Newcastle-under-Lyme	8
Oldham	4
Plymouth	12
Poole	4
Reading	6
Rochester	22
Rotherham	11
Sheffield	4
Sunderland	5
Swansea	27
Wigan	13
Worcester	1

	May
Andover	17
Bury St. Edmunds	6
Cambridge	27
Croydon	26
Devizes	20

	May
Dudley	26
Hereford	6
Southend-on-Sea	16
Winchester	5

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SUMMER ASSIZES, 1960

First Working Days

South Eastern Circuit (Jones and Slade JJ.)

May
12: Huntingdon
17: Hertford
24: Cambridge
31: Bury St. Edmunds

June
8: Norwich
16: Chelmsford
28: Kingston

July
5: Maidstone
19: Lewes

Wales and Chester Circuit (Byrne, Glyn-Jones and Lloyd-Jones JJ.)

May
3: Welshpool
6: Dolgellau
10: Caernarvon
17: Beaumaris
19: Ruthin
26: Mold
31: Chester

June
16: Presteign
18: Brecon
23: Lampeter
25: Haverfordwest
30: Carmarthen

July
6: Swansea

Western Circuit (Pilcher, Gorman and Phillimore JJ.)

May	*June*	*July*
10: Salisbury	8: Exeter	5: Winchester
17: Dorchester	21: Bristol	
24: Taunton		
31: Bodmin		

Northern Circuit (Sachs, Hinchcliffe, Elwes and Hewson JJ.)

May	*June*	*July*
14: Appleby	8: Liverpool	5: Manchester
17: Carlisle		
26: Lancaster		

Oxford Circuit (Stable and Thesiger JJ.)

May	*June*	*July*
4: Oxford	1: Newport	12: Birmingham
17: Worcester	15: Hereford	
24: Gloucester	21: Shrewsbury	
	28: Stafford	

Midland Circuit (Finnemore, Ashworth and Stevenson JJ.)

May	*June*	*July*
4: Aylesbury	1: Oakham	5: Warwick
10: Bedford	2: Lincoln	12: Birmingham
17: Northampton	14: Derby	
24: Leicester	21: Nottingham	

North Eastern Circuit (Wallington, Streatfeild, McNair and Edmund Davies JJ.)

May	*June*	*July*
10: Newcastle	8: York	5: Leeds
24: Durham	21: Sheffield	

Central Criminal Court, 1960

First Working Days

May 17 June 21

County Quarter Sessions

	May		May
Devonshire	17	Kent, West	23
Essex	4, 31	Kent, West (Appeals)	16, 17
Essex (Appeals)	24	Lincolnshire (Lindsey: Lincoln)	10
Hertfordshire (Hertford)	23	Nottinghamshire (Newark)	9
Hertfordshire (Hertford) (Appeals)	24	Oxfordshire (Appeals)	31
Kent, East	9	Sussex, West	12

	June		June
Anglesey	21	Kent, East	27
Berkshire	27	Kent, East (Appeals)	3
Buckinghamshire	27	Kent, West (Appeals)	20, 21
Caernarvonshire	30	Leicestershire	14
Cheshire (Chester)	22	Lincolnshire (Holland: Boston)	27
Cheshire (Knutsford)	27	Northamptonshire	9
Cornwall (Bodmin)	28	Nottinghamshire (Nottingham)	9
Essex	29	Oxfordshire (Appeals)	28
Essex (Appeals)	27	Rutland	21
Glamorganshire (Cardiff)	28	Somerset	8
Gloucestershire	22	Suffolk, West	28
Hampshire	20	Sussex, West	23
Hertfordshire (Hertford)	27	Warwickshire	21
Hertfordshire (Hertford) (Appeals)	28	Yorkshire, East Riding	21
Isle of Wight	8	Yorkshire, West Riding	20

BOROUGH QUARTER SESSIONS

	May		May
Andover	17	Dudley	26
Bury St. Edmunds	6	Hereford	6
Cambridge	27	Lichfield	2
Croydon	26	Oxford	26
Devizes	20	Southend-on-Sea	16
		Swansea	5
		Winchester	5

	June		June
Poole	27	Worcester	24
Shrewsbury	7		

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SUMMER ASSIZES, 1960

First Working Days

South Eastern Circuit (Jones and Slade JJ.)

June	*July*
8: Norwich	5: Maidstone
16: Chelmsford	19: Lewes
28: Kingston	

Wales and Chester Circuit (Byrne, Glyn-Jones and Lloyd-Jones JJ.)

June	*July*
16: Presteign	6: Swansea
18: Brecon	
23: Lampeter	
25: Haverfordwest	
30: Carmarthen	

Western Circuit (Pilcher, Gorman and Phillimore JJ.)

June	*July*
8: Exeter	5: Winchester
21: Bristol	

Northern Circuit (Sachs, Hinchcliffe, Elwes and Hewson JJ.)

June	*July*
8: Liverpool	5: Manchester

Oxford Circuit (Stable and Thesiger JJ.)

June	*July*
1: Newport	12: Birmingham
15: Hereford	
21: Shrewsbury	
28: Stafford	

Midland Circuit (Finnemore, Ashworth and Stevenson JJ.)

June	*July*
1: Oakham	5: Warwick
2: Lincoln	12: Birmingham
14: Derby	
21: Nottingham	

North Eastern Circuit (Wallington, Streatfeild, McNair and Edmund Davies JJ.)

June	*July*
8: York	5: Leeds
21: Sheffield	

CENTRAL CRIMINAL COURT, 1960

First Working Days

June 21	July 12

COUNTY QUARTER SESSIONS

	June		June
Anglesey	21	Kent, East	27
Berkshire	27	Kent, East (Appeals)	3
Buckinghamshire	27	Kent, West (Appeals)	20, 21
Caernarvonshire	30	Leicestershire	14
Cheshire (Chester)	22	Lincolnshire (Holland: Boston)	27
Cheshire (Knutsford)	27	Northamptonshire	9
Cornwall (Bodmin)	28	Nottinghamshire (Nottingham)	9
Essex	29	Oxfordshire (Appeals)	28
Essex (Appeals)	27	Rutland	21
Glamorganshire (Cardiff)	28	Somerset	8
Gloucestershire	22	Suffolk, West	28
Hampshire	20	Sussex, West	23
Hertfordshire (Hertford)	27	Warwickshire	21
Hertfordshire (Hertford) (Appeals)	28	Yorkshire, East Riding	21
Isle of Wight	8	Yorkshire, West Riding	20

	July
Bedfordshire	4
Cambridgeshire	1
Cardigan	7
Carmarthenshire	8
Cumberland	5
Denbighshire (Colwyn Bay)	1
Derbyshire	6
Devonshire	12
Dorset	6
Essex	26
Essex (Appeals)	19
Flintshire	7
Herefordshire	4
Hertfordshire (St. Albans)	25
Hertfordshire (St. Albans) (Appeals)	26
Huntingdonshire	5
Isle of Ely (Wisbech)	6
Kent, East (Appeals)	15

	July
Kent, West	18
Kent, West (Appeals)	13, 14
Lincolnshire (Kesteven: Stamford)	14
Lincolnshire (Lindsey: Lincoln)	7
Merioneth (Bala)	5
Monmouthshire	6
Montgomeryshire (Newton)	7
Norfolk (King's Lynn)	13
Norfolk (Norwich)	6
Nottinghamshire (East Retford)	25
Oxfordshire	5
Oxfordshire (Appeals)	26
Shropshire	6
Suffolk, East	1
Westmorland	1
Wiltshire (Warminster)	6
Worcestershire	13

BOROUGH QUARTER SESSIONS

	June
Cambridge	3
Hastings	10
Poole	27
Sheffield	8

	June
Shrewsbury	7
West Bromwich	9
Worcester	24

	July
Andover	12
Birkenhead	13
Bridgwater	21
Bristol	25
Bury St. Edmunds	15
Cambridge	22
Canterbury	7
Croydon	14
Dover	28
Folkestone	9
Grantham	8

	July
Gravesend	7
Ipswich	7
Maidstone	4
Margate	22
Newark	20, 21
Peterborough	7
Reading	13
Rochester	22
Southend-on-Sea	11
Swansea	27

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Summer Assizes, 1960

First Working Days

South Eastern Circuit (Jones and Slade JJ.)

July

5: Maidstone
19: Lewes

Wales and Chester Circuit (Byrne, Glyn-Jones and Lloyd-Jones JJ.)

July

6: Swansea

Western Circuit (Pilcher, Gorman and Phillimore JJ.)

July

5: Winchester

Northern Circuit (Sachs, Hinchcliffe, Elwes and Hewson JJ.)

July

5: Manchester

Oxford Circuit (Stable and Thesiger JJ.)

July

12: Birmingham

Midland Circuit (Finnemore, Ashworth and Stevenson JJ.)

July

5: Warwick
12: Birmingham

North Eastern Circuit (Wallington, Streatfeild, McNair and Edmund Davies JJ.)

July

5: Leeds

CENTRAL CRIMINAL COURT, 1960

First Working Days
July 12

COUNTY QUARTER SESSIONS

	July		July
Bedfordshire	4	Kent, West	18
Cambridgeshire	1	Kent, West (Appeals)	13, 14
Cardigan	7	Lincolnshire (Kesteven: Stamford)	14
Carmarthenshire	8	Lincolnshire (Lindsey: Lincoln)	7
Cumberland	5	Merioneth (Bala)	5
Denbighshire (Colwyn Bay)	1	Monmouthshire	6
Derbyshire	6	Montgomeryshire (Newton)	7
Devonshire	12	Norfolk (King's Lynn)	13
Dorset	6	Norfolk (Norwich)	6
Essex	26	Nottinghamshire (East Retford)	25
Essex (Appeals)	19	Oxfordshire	5
Flintshire	7	Oxfordshire (Appeals)	26
Herefordshire	4	Shropshire	6
Hertfordshire (St. Albans)	25	Suffolk, East	1
Hertfordshire (St. Albans) (Appeals)	26	Westmorland	1
Huntingdonshire	5	Wiltshire (Warminster)	6
Isle of Ely (Wisbech)	6	Worcestershire	13
Kent, East (Appeals)	15		

	August		*August*
Essex	31	Kent, West (Appeals)	22, 23
Essex (Appeals)	25	Oxfordshire (Appeals)	30
Kent, East	15	Sussex, West	4
Kent, East (Appeals)	26		

BOROUGH QUARTER SESSIONS

	July		July
Andover	12	Lincoln	11
Birkenhead	13	Maidstone	4
Bridgwater	21	Margate	22
Bristol	25	Newark	20, 21
Bury St. Edmunds	15	Oxford	21
Canterbury	7	Peterborough	7
Croydon	14	Plymouth	4
Derby	14	Reading	20
Dover	28	Rochester	22
Folkestone	9	Southend-on-Sea	11
Grantham	8	Sunderland	5
Gravesend	7	Swansea	27
Ipswich	7		

	August		*August*
Cambridge	5	Wigan	3
Cardiff	3	Winchester	3
Deal	8		

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AUTUMN ASSIZES

First Working Days

South Eastern Circuit (Hilbery and Finnemore JJ.)

October

4: Hertford
11: Cambridge
18: Ipswich
25: Norwich

November

1: Chelmsford
15: Kingston
22: Maidstone

December

6: Lewes

Wales and Chester Circuit (Jones, Davies and Stevenson JJ.)

October

5: Caernarvon
12: Ruthin
20: Chester

November

5: Brecon
10: Carmarthen
17: Swansea

Western Circuit (Cassels, Donovan and Wrangham JJ.)

October

5: Salisbury
11: Dorchester
18: Taunton
25: Bodmin

November

1: Exeter
15: Bristol
29: Winchester

Northern Circuit (Stable, Paull, Salmon and Hewson JJ.)

October	*November*
5: Carlisle	1: Liverpool
18: Lancaster	22: Manchester

Oxford Circuit (Barry and Pearson JJ.)

October	*November*	*December*
4: Reading	3: Newport	6: Birmingham
11: Oxford	15: Hereford	
18: Worcester	22: Shrewsbury	
25: Gloucester	29: Stafford	

Midland Circuit (Karminski, Havers and Winn JJ.)

October	*November*	*December*
5: Aylesbury	1: Lincoln	6: Birmingham
11: Bedford	8: Derby	
18: Northampton	15: Nottingham	
25: Leicester	29: Warwick	

North Eastern Circuit (Sachs, Hinchcliffe, Edmund Davies and Marshall JJ.)

October	*November*
5: Newcastle	1: York
18: Durham	15: Sheffield
	29: Leeds

CENTRAL CRIMINAL COURT, 1960

First Working Day
September 6

COUNTY QUARTER SESSIONS

	August
Essex (Appeals)	25
Kent, East	15
Kent, East (Appeals)	26

	August
Kent, West (Appeals)	22, 23
Oxfordshire (Appeals)	30
Sussex, West	4

	September
Anglesey	27
Bedfordshire	21
Berkshire	26
Buckinghamshire	26
Caernarvonshire	15
Carmarthenshire	30
Cornwall (Bodmin)	27
Cumberland	27
Denbighshire (Wrexham)	30
Devonshire	20
Dorset	28
Essex	5

	September
Essex (Appeals)	20
Flintshire	29
Glamorganshire (Swansea)	27
Gloucestershire	21
Hampshire	19
Hertfordshire (St. Albans)	26
Hertforshire (St. Albans) (Appeals)	27
Isle of Wight	21
Kent, West	5
Kent, West (Appeals)	19, 20
Lincolnshire (Lindsey: Lincoln)	20

	September
Merioneth (Dolgellau)	20
Montgomeryshire (Welshpool)	22
Norfolk (Norwich)	28
Northamptonshire	29
Oxfordshire	27
Oxfordshire (Appeals)	20
Rutland	20
Shropshire	21
Somerset	21
Suffolk, East	30
Suffolk, West	27
Sussex, West	29
Warwickshire	27
Wiltshire (Marlborough)	28
Worcestershire	28
Yorkshire, East Riding	20

BOROUGH QUARTER SESSIONS

	August
Burnley	11
Cambridge	5
Cardiff	3
Deal	8
Sheffield	15
Wigan	3
Winchester	3

	September
Banbury	6
Cambridge	9
Cardiff	19
Croydon	19
Devizes	9
Dover	29
Dudley	26
Hereford	2
Poole	26
Rochester	30
Shrewsbury	6
Southend-on-Sea	19
West Bromwich	19
Worcester	30

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Calendar

AUTUMN ASSIZES

First Working Days

South Eastern Circuit (Hilbery and Finnemore JJ.)

October	*November*	*December*
4: Hertford	1: Chelmsford	6: Lewes
11: Cambridge	15: Kingston	
18: Ipswich	22: Maidstone	
25: Norwich		

Wales and Chester Circuit (Jones, Davies and Stevenson JJ.)

October	*November*
5: Caernarvon	5: Brecon
12: Ruthin	10: Carmarthen
20: Chester	17: Swansea

Western Circuit (Cassels, Donovan and Wrangham JJ.)

October	*November*
5: Salisbury	1: Exeter
11: Dorchester	15: Bristol
18: Taunton	29: Winchester
25: Bodmin	

Northern Circuit (Stable, Paull, Salmon and Hewson JJ.)

October	*November*
5: Carlisle	1: Liverpool
18: Lancaster	22: Manchester

Oxford Circuit (Barry and Pearson JJ.)

October	*November*	*December*
4: Reading	3: Newport	6: Birmingham
11: Oxford	15: Hereford	
18: Worcester	22: Shrewsbury	
25: Gloucester	29: Stafford	

Midland Circuit (Karminski, Havers and Winn JJ.)

October	*November*	*December*
5: Aylesbury	1: Lincoln	6: Birmingham
11: Bedford	8: Derby	
18: Northampton	15: Nottingham	
25: Leicester	29: Warwick	

North Eastern Circuit (Sachs, Hinchcliffe, Edmund Davies and Marshall JJ.)

October	*November*
5: Newcastle	1: York
18: Durham	15: Sheffield
	29: Leeds

CENTRAL CRIMINAL COURT, 1960

First Working Days

September 6	October 11

COUNTY QUARTER SESSIONS

	September		September
Anglesey	27	Isle of Wight	21
Bedfordshire	21	Kent, West	5
Berkshire	26	Kent, West (Appeals)	19, 20
Buckinghamshire	26	Lincolnshire (Lindsey: Lincoln)	20
Caernarvonshire	15	Merioneth (Dolgellau)	20
Carmarthenshire	30	Montgomeryshire (Welshpool)	22
Cornwall (Bodmin)	27	Norfolk (Norwich)	28
Cumberland	27	Northamptonshire	29
Denbighshire (Wrexham)	30	Oxfordshire	27
Devonshire	20	Oxfordshire (Appeals)	20
Dorset	28	Rutland	20
Essex	5	Shropshire	21
Essex (Appeals)	20	Somerset	21
Flintshire	29	Suffolk, East	30
Glamorganshire (Swansea)	27	Suffolk, West	27
Gloucestershire	21	Sussex, West	29
Hampshire	19	Warwickshire	27
Hertfordshire (St. Albans)	26	Wiltshire (Marlborough)	28
Hertforshire (St. Albans)		Worcestershire	28
(Appeals)	27	Yorkshire, East Riding	20

	October
Cambridgeshire	7
Cardigan	6
Cheshire (Chester)	3
Cheshire (Knutsford)	10
Derbyshire	5
Devonshire	25
Essex	26
Essex (Appeals)	18
Herefordshire	3
Huntingdonshire	4
Isle of Ely (Ely)	5
Isle of Wight	5
Kent, East	3
Kent, East (Appeals)	7
Kent, West	17

	October
Kent, West (Appeals)	10, 11
Leicestershire	11
Lincolnshire (Holland: Spalding)	6
Lincolnshire (Kesteven: Sleaford)	13
Lincolnshire (Lindsey: Lincoln)	20
Monmouthshire	5
Norfolk (King's Lynn)	5
Nottinghamshire (Nottingham)	3
Oxfordshire (Appeals)	25
Peterborough, Soke of	13
Westmorland	7
Yorkshire, West Riding	10

BOROUGH QUARTER SESSIONS

	September
Banbury	6
Cambridge	9
Cardiff	21
Croydon	19
Devizes	9
Dover	29
Dudley	26
Hereford	2
Lichfield	16

	September
Oldham	27
Oxford	22
Poole	26
Rochester	30
Shrewsbury	6
Southend-on-Sea	19
West Bromwich	19
Worcester	30

	October
Andover	25
Bridgwater	20
Bristol	3
Bury St. Edmunds	21
Canterbury	20
Croydon	20
Folkestone	8
Grantham	7
Gravesend	6

	October
Ipswich	6
Maidstone	10
Margate	7
Newark	27, 28
Poole	3
Reading	19
Swansea	31
Winchester	27

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Calendar

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First Working Days

South Eastern Circuit (Hilbery and Finnemore JJ.)

November
1: Chelmsford
15: Kingston
22: Maidstone

December
6: Lewes

Wales and Chester Circuit (Jones, Davies and Stevenson JJ.)

November
5: Brecon
10: Carmarthen
17: Swansea

Western Circuit (Cassels, Donovan and Wrangham JJ.)

November
1: Exeter
15: Bristol
29: Winchester

Northern Circuit (Stable, Paull, Salmon and Hewson JJ.)

November
1: Liverpool
22: Manchester

Oxford Circuit (Barry and Pearson JJ.)

November	*December*
3: Newport	6: Birmingham
15: Hereford	
22: Shrewsbury	
29: Stafford	

Midland Circuit (Karminski, Havers and Winn JJ.)

November	*December*
1: Lincoln	6: Birmingham
8: Derby	
15: Nottingham	
29: Warwick	

North Eastern Circuit (Sachs, Hinchcliffe, Edmund Davies and Marshall JJ.)

November

1: York
15: Sheffield
29: Leeds

COUNTY QUARTER SESSIONS

	November		November
Essex	30	Kent, East (Appeals)	18
Essex (Appeals)	22	Kent, West (Appeals)	14, 15
Hertfordshire (Hertford)	29	Nottinghamshire (Newark)	9
Hertfordshire (Hertford) (Appeals)	15	Oxfordshire (Appeals)	29
Kent, East	7	Sussex, West	3
		Westmorland	18

	December		December
Anglesey	13	Kent, West	12
Caernarvonshire	29	Kent, West (Appeals)	19, 20
Essex (Appeals)	20	Oxfordshire (Appeals)	20
Gloucestershire	6, 7	Yorkshire, East Riding	13

BOROUGH QUARTER SESSIONS

	November		November
Burnley	18	Guildford	5
Cambridge	25	Hereford	18
Croydon	24	Lichfield	18
Deal	18	Oxford	18
Derby	23	Southend-on-Sea	14
Devizes	25	Swansea	10

	December		December
Banbury	6	West Bromwich	12
Dudley	15	Worcester	22
Shrewsbury	20		

	November
Essex	30
Essex (Appeals)	22
Hertfordshire (Hertford)	29
Hertfordshire (Hertford) (Appeals)	15
Kent, East	7

	November
Kent, East (Appeals)	18
Kent, West (Appeals)	14, 15
Nottinghamshire (Newark)	9
Oxfordshire (Appeals)	29
Sussex, West	3

BOROUGH QUARTER SESSIONS

	October
Andover	25
Blackburn	11
Bridgwater	20
Bristol	3
Bury St. Edmunds	21
Canterbury	20
Croydon	20
Folkestone	8
Grantham	7
Gravesend	6
Ipswich	6

	October
Maidstone	10
Margate	7
Newark	27, 28
Newcastle-under-Lyme	5
Plymouth	10
Poole	3
Reading	19
Swansea	31
Winchester	27
Wolverhampton	10

	November
Cambridge	25
Croydon	24
Deal	18

	November
Devizes	25
Hereford	18
Southend-on-Sea	14

The Admissibility of CONFESSIONS in Criminal Matters

Few branches of the law of evidence have given both judge and practitioner as much difficulty as the admissibility of statements made by the accused. This is partly due to the fact that in this branch of the law no case can possibly be on all fours with any other, and, moreover, on questions of evidence the court is obliged to be both judge and jury. It is therefore not surprising to find that rulings differ more than one might ordinarily expect.

This book is intended as a ready reference manual for all those engaged in the administration of criminal justice. By distilling the principles from the cases the author, himself a prominent criminal lawyer, has made an excellent statement of the law as it is today in Canada. It is a well-written statement and will appeal to lawyer and policeman alike.

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Calendar

AUTUMN ASSIZES

First Working Days

South Eastern Circuit (Hilbery and Finnemore JJ.).

December

6: Lewes

Oxford Circuit (Barry and Pearson JJ.).

December

6: Birmingham

Midland Circuit (Karminski, Havers and Winn JJ.).

December

6: Birmingham

CENTRAL CRIMINAL COURT

First Working Day

December 6

CALENDAR

COUNTY QUARTER SESSIONS

	December		December
Northamptonshire	15	Yorkshire, East Riding	13
Oxfordshire (Appeals)	20		

BOROUGH QUARTER SESSIONS

	December		December
Abingdon	14	Shrewsbury	20
Banbury	6	West Bromwich	12
Dudley	15	Worcester	22

Criminal Law Review

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Calendar

Autumn Assizes

First Working Days

South Eastern Circuit (Hilbery and Finnemore JJ.)

November	*December*
1: Chelmsford	6: Lewes
15: Kingston	
22: Maidstone	

Wales and Chester Circuit (Jones, Davies and Stevenson JJ.)

November
5: Brecon
10: Carmarthen
17: Swansea

Western Circuit (Cassels, Donovan and Wrangham JJ.)

November
1: Exeter
15: Bristol
29: Winchester

Northern Circuit (Stable, Paull, Salmon and Hewson JJ.)

November

1: Liverpool
22: Manchester

Oxford Circuit (Barry and Pearson JJ.)

November

3: Newport
15: Hereford
22: Shrewsbury
29: Stafford

December

6: Birmingham

Midland Circuit (Karminski, Havers and Winn JJ.)

November

1: Lincoln
8: Derby
15: Nottingham
29: Warwick

December

6: Birmingham

North Eastern Circuit (Sachs, Hinchcliffe, Edmund Davies and Marshall JJ.)

November

1: York
15: Sheffield
29: Leeds

CENTRAL CRIMINAL COURT, 1960

First Working Day

October 11

COUNTY QUARTER SESSIONS

	October
Cambridgeshire	7
Cardigan	6
Cheshire (Chester)	3
Cheshire (Knutsford)	10
Derbyshire	5
Devonshire	25
Essex	26
Essex (Appeals)	18
Herefordshire	3
Huntingdonshire	4
Isle of Ely (Ely)	5
Isle of Wight	5
Kent, East	3
Kent, East (Appeals)	7
Kent, West	17
Kent, West (Appeals)	10, 11
Leicestershire	11
Lincolnshire (Holland: Spalding)	6
Lincolnshire (Kesteven: Sleaford)	13
Lincolnshire (Lindsey: Lincoln)	20
Monmouthshire	5
Norfolk (King's Lynn)	5
Nottinghamshire (Nottingham)	3
Oxfordshire (Appeals)	25
Peterborough, Soke of	13
Sunderland	25
Westmorland	7
Yorkshire, West Riding	10

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[1960] Crim.L.R. 1-72

The Criminal Law Review

EDITORIAL 1

INTERPRETATION OF THE HOMICIDE ACT, 1957 *D. W. Elliott* 5

SHOULD THE POLICE FINE OFFENDERS ON THE SPOT? *Athelstan Popkess* 14

RECEIVING STOLEN PROPERTY *R. H. A. Eames* 20

MR. SUTTERTHWICK'S COURT—Driving while Disqualified *A. E. Jones* 34

COMMITTAL ON INQUISITION *J. D. J. Havard* 44

Practice and Procedure 55

Case and Comment 56

Principles of Punishment 65

Acts and Orders 66

Practical Problems 67

Books and Periodicals 69

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What appears most clearly from the report—and perhaps even more clearly from the tables which follow it—is that the majority of present maximum sentences are the result of historical accident and not of any conscious, thought-out policy related to the gravity of the various offences or the possibility of aggravating or mitigating circumstances. The report makes out a clear case for a reconsideration of this aspect of the law.

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